THE SATELLITE TELEVISION LAW: REPEAL, REAUTHORIZE, OR REVISE?

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

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THE SATELLITE TELEVISION LAW: REPEAL, REAUTHORIZE, OR REVISE?

WEDNESDAY, JUNE 12, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:35 a.m., in room 2123 of the Rayburn House Office Building, Hon. Greg Walden (chairman of the subcommittee) presiding.

Members present: Representatives Walden, Latta, Blackburn, Scalise, Gardner, Barton, Eshoo, Doyle, Welch, Lujan, Dingell, Matheson, and Waxman (ex officio).

Staff present: Gary Andres, Staff Director; Ray Baum, Senior Policy Advisor/Director of Coalitions; Sean Bonyun, Communications Director; Andy Duberstein, Deputy Press Secretary; Neil Fried, Chief Counsel, Communications and Technology; Kelsey Guyselman, Counsel, Telecom; David Redl, Counsel, Telecom; Charlotte Savercool, Executive Assistant, Legislative Clerk; Shawn Chang, Democratic Senior Counsel; Patrick Donovan, Democratic FCC Detail; Margaret McCarthy, Democratic Staff; Roger Sherman, Democratic Chief Counsel; and Kara Van Stralen, Democratic Policy Analyst.

OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WALDEN. Good morning to everyone. I want to call to order the Subcommittee on Communications and Technology for "The Satellite Television Law: Repeal, Reauthorize, or Revise?" hearing. This is our second hearing on this issue, and I want to welcome our witnesses today and thank you all for agreeing to come and share your knowledge and opinions with us. I want to especially welcome Amy Tykeson, who is the CEO of Bend Broadband, a constituent of mine, and to congratulate her on her award last night. She was inducted into the Cable Industry Hall of Fame. Congratulations, Amy, to you. She is a dynamic leader in the cable industry and in the Central Oregon community, and we are delighted she made the trip out here and is willing to testify.

The hearing will examine today whether the law authorizing satellite television providers to redistribute broadcast programming still serves an important function, or is out of step with today's video marketplace. The law is now 25 years old, and aspects of it sunset on December 31, 2014. So the question is, should Congress

repeal the law, reauthorize it as it is, or revise it, possibly even tackling non-satellite specific video issues.

Congress passed the original law in 1988 to give the then-nascent satellite industry a leg up in providing distant broadcast signals to viewers out of range of local over-the-air signals. Today, however, DIRECTV and Dish control ⅓ of the pay-television market and are the second and third largest pay-TV providers behind Comcast. And by some estimates only 1 to 1.5 million of the 115.9 million U.S. television households still receive distant signals. That is about 1 percent. DISH also now carries the local signals of broadcasters in all 210 markets and DIRECTV carries them in 197 markets.

On the other hand, a million viewers still represent a lot of potentially angry letters and calls reminding those of us in Congress about that, as I say, that clause in the Constitution that gives Americans the right to watch whatever they want, whenever they want, wherever and however they want on whatever device they have.

Some stakeholders argue we should use the reauthorization to revisit retransmission consent. They also argue we should take another look at cable regulations, such as the must-carry, basic-tier, buy through, program carriage, program access, and set-top box rules. Those regulations date to 1992 and 1996, when cable had 98 and 89 percent of the pay-television market. As of 2010, cable television's share had dropped to 59.3 percent of pay-TV households and 51.6 percent of all TV households.

So I am open to debate on a whole host of these issues and all options remain on the table. I believe in good process, and one of our responsibilities is to make sure we operate publicly and transparently, giving the American people and stakeholders an opportunity to see what is happening and to contribute to this dialogue. The video market is changing rapidly. Phone companies are in the video business now, both over wires and wireless. Netflix is offering original programming over the Internet. And Aereo, for better or for worse, could turn everything upside down.

Ultimately, the question is can we better ensure viewers have access to the programming they want while respecting the investments of the networks that create it and the broadcasters and pay-TV companies that deliver it? Today the government intervenes in various ways in that relationship between viewers, broadcast affiliates, network programmers and pay-TV distributors. Sometimes it does so to the benefit of one; other times to the benefit of another. Should it be intervening at all in the current marketplace? And if the answer is yes in some cases but not others, what is the justification?

[The prepared statement of Mr. Walden follows:]

PREPARED STATEMENT OF HON. GREG WALDEN

I want to welcome all the witnesses to today's hearing as we continue our discussion of STELA and all issues related thereto. I want to especially welcome Amy Tykeson, CEO of BendBroadband, and congratulate her on her award last night as she was inducted into the Cable Industry Hall of Fame. She is a dynamic leader in the cable industry and it is an honor to have her here from central Oregon in my district.

This hearing will examine whether the law authorizing satellite television providers to redistribute broadcast programming still serves an important function or is out of step with today's video marketplace. The law is now 25 years old and aspects of it sunset in December 31, 2014. Should Congress repeal the law, reauthorize it as is, or revise it, possibly even tackling non-satellite specific video issues?

Congress passed the original law in 1988 to give the then-nascent satellite industry a leg up in providing distant broadcast signals to viewers out of range of local over-the-air signals. Today, however, DirecTV and Dish control one third of the pay-TV market and are the second and third largest pay-TV providers behind Comcast. And by some estimates only 1–1.5 million of the 115.9 million U.S. television households still receive distant signals. That's about one percent. DISH also now carries the local signals of broadcasters in all 210 markets and DirecTV carries them in 197 markets.

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# # #

Mr. WALDEN. With that, I yield the balance of my time to the vice chair of the subcommittee, the gentleman from Ohio, Mr. Latta.

Mr. LATTA. Thank you, Mr. Chairman, and I appreciate you holding this hearing today, and I also thank all of our witnesses for their testimony that they are going to be giving, and the expertise that they have as this subcommittee considers the satellite television law.

I am glad, Mr. Chairman, that we have started the process of examining STELA early on in this Congress. We all know that December, 2014, will be here before we know it. It is important to have the opportunity to have a robust discussion about the satellite TV marketplace and determining if the law needs to be reauthorized, revised, or repealed.

I believe it is extremely worthwhile that Congress has the obligation every 5 years to review this law. As we all know, the communications and video marketplace has changed dramatically and is constantly evolving, and I hope that this hearing and others are the continuation of a thoughtful public debate surrounding the

video marketplace. I look forward to hearing from our witnesses today, Mr. Chairman, and I yield back.

Mr. WALDEN. Gentleman yields back the balance of his time—balance of my time, and with that, I will yield back the balance of my time and recognize the ranking member from California, Ms. Eshoo, for 5 minutes.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman, for holding this hearing, and welcome to our witnesses and many distinguished representatives from the many sectors that are in the audience this morning.

Today begins, obviously, the second in the subcommittee's series of hearings on the Satellite Television Extension and Localism Act, STELA, a law allowing consumers across our country who subscribe to satellite TV to receive local broadcast programming. Following today's hearing, we will have had and heard from a total of 11 witnesses in the first 6 months of this Congress, plus countless others who have individually visited our offices to provide their perspective on STELA. These voices include representatives of the satellite, broadcast, cable, and motion picture industries, but I think that we need to now look forward to taking action.

Mr. Chairman, I think that following today's hearing, we should instruct our respective staffs to work expeditiously on drafting legislative text so we can pass a bill long before the December 31, 2014, deadline. We have both stated publically that we want a clean bill. We know that Judiciary has some jurisdiction in this, so it will take some time for them to do their work. So I think that we need to get going with this.

So much has changed since the 1992 Cable Act, the process by which broadcasters and pay-TV providers negotiated or how they negotiate retrans, the proliferation of blackouts, and now the emerging online video marketplace, and I think that we need to be examining all of these aspects. So we have a lot of work to do beyond STELA. I am struck—on the broader video market, I am struck by the rapid transformation underway. In particular, three statistics highlight how consumer behavior is changing. By 2017, which is not that far away, 58 billion hours of TV and video is expected to be viewed on tablets per year. That is a remarkable statistic. Online video will account for 69 percent of consumer Internet traffic by 2017, up from 57 percent in 2012. The number of web-enabled TVs in consumers' homes will grow from close to 180 million in 2012 to 827 million in 2017.

So what do all of these statistics mean for our work here at the subcommittee? In addition to freeing up more spectrum and expanding the deployment of high speed broadband to all Americans, we need to recognize that a shift is occurring where the primary means of video distribution might be radically different than the options available to consumers today. Consumers, as the chairman said, want greater choice in programming and how they receive it, and I think this subcommittee should not ever be viewed as a barrier to exciting innovation. So a video marketplace with vibrant

competition among the services consumers most desire is really a very, very healthy one.

So again, I welcome each one of the witnesses. Congratulations to you, Ms. Tykeson, for the wonderful award that you have received from the cable industry. Thank you all for being here and for how instructive your testimony will be to us.

I would be happy to yield the remainder of my time to anyone. Anyone? Any takers on my side? No? With that, I will yield back. Thank you.

Mr. WALDEN. Gentlelady yields back. Chairman now recognizes the vice chair of the full committee, Mrs. Blackburn.

OPENING STATEMENT OF HON. MARSHA BLACKBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mrs. BLACKBURN. Thank you, Mr. Chairman. Welcome to all of our witnesses. We thank you for your time and for being here. This is an important opportunity for us to learn how we can continue to give TV consumers the best value, the very best value in terms of price, content, quality, and delivery. In this subcommittee last June, members of both parties acknowledged that the 20-year-old video regulations on the books are obsolete. I don't think there is any disagreement on that point at all. Technology has changed dramatically, but the law hasn't kept up. Today's cable, satellite, broadcast, telecom, and online video providers offer competing delivery services and packages, and they are governed by different rules.

The question before us is how can we fix a really complex web of regulations that is limiting consumer benefits, restricting content choices, leading to blackouts, and contributing to rising prices? How do we rationalize old rules for the dynamic innovation that is happening before us? Are disruptive technologies ones that can provide broadcast content without paying a performance right? Everybody knows that is one of my issues, a byproduct of this outdated video framework.

We should have a vibrant debate and welcome input from everyone as we review STELA, but most importantly, we need to look at what the proper role of government is and refocus on the best interests of our constituents, who are the consumers of video content. They do expect a level playing field.

Mr. Chairman, I thank you and I yield back.

Mr. WALDEN. The chair now recognizes the gentleman from Louisiana, Mr. Scalise.

OPENING STATEMENT OF HON. STEVE SCALISE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. SCALISE. Thank you, Mr. Chairman. Thank you for holding this hearing. I want to thank our panelists. I look forward to hearing from you all as well.

When we look at the title of the hearing today, "The Satellite Television Law: Repeal, Reauthorize, or Revise?" I would think the subcommittee would be wise to revise and expand the STELA debate by addressing the other intertwined video issues. Many of

these issues are government-created imbalances that have arisen over the past 2 decades as the marketplace underwent dramatic transformation. As the gentlelady from Tennessee just mentioned, we take for granted that as we are having this hearing today, many of us have handheld devices that can actually pull video and do so many other things that make our life very convenient, but when these laws were written, the device of the day was more like this device. And so when you think that we are currently governed by laws that were written based on the technology of this device, it shows us, I think, that when we think of the new technologies that we have the ability to have access to, the laws dramatically need revision and updating. And for anyone who seeks further evidence of the marketplace transformation, look no further than the ongoing Aereo court case that is moving through the courts right now, just to show you where the imbalance can occur.

Instead of allowing a vast web of government regulations to influence the carriage of programming, we should trust the consumer demand that it is a strong enough tool to ensure that quality programming is carried by pay-TV providers at a rate that both willing buyers and willing sellers can agree upon, without the government thumbing the scale for one industry or another. That is all I am after in this debate, which I believe we can accomplish by reverting back to the basic tenets of property rights and consumer demand to guide the video marketplace forward.

I encourage my colleagues to join me in this pursuit, and again, I look forward to the testimony and the questioning from our witnesses, and I thank the chairman and I yield back the balance of my time.

Mr. WALDEN. Is there anyone else on the Republican side that wants the remaining minute? If not, we will yield back the time and I now recognize the former chairman of the committee, the gentleman from California, Mr. Waxman, for 5 minutes.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you very much, Mr. Chairman.

Today's hearing is the second time this year that this subcommittee has convened to examine issues surrounding the upcoming expiration of the Satellite Television Extension and Localism Act of 2010, or what we call STELA. The reauthorization of STELA involves interlocking communications and copyright law provisions that must be jointly addressed by our committee and the Judiciary Committee, and as I stated at our hearing in February, because of the complexity of this task, I start from the presumption that we should pursue a clean reauthorization. Congress must complete its work before the law expires so consumers do not inadvertently lose access to programming. At the same time, I believe that reauthorization provides us an opportunity for members to learn more about today's video marketplace and assess whether laws and regulations are keeping pace.

As we begin this conversation, we need to consider how we can continue to ensure diversity, localism, and competition, which are the principles that undergird our Nation's media policy. Congress

has recognized the need to protect many of these values, especially when the market might not. New avenues for online video distribution are creating exciting new opportunities for consumers and content creators alike, but to realize these opportunities, competitors may need access to must-have content and independent creators may need the opportunity for their program to reach audiences far and wide.

I represent many interested parties in today's debate in my congressional district. Many of my constituents are the artists, writers, producers, and directors whose creativity drives consumer demand for video and who deserve to be compensated fairly. Many of my constituents work at the studios and media companies like Disney that make desirable content available to consumers. I also represent companies like Santa Monica-based Tennis Channel. The Tennis Channel is an independent cable channel that offers consumers unique tennis and tennis-related programming. Congress sought to protect the diversity offered by independent channels like the Tennis Channel in the 1992 Cable Act by adopting provisions to guard against discrimination by vertically integrated distributors. The CEO of the Tennis Channel, Ken Solomon, sent the committee a letter today outlining his perspective on the effectiveness of the FCC's so-called program carriage rules, and Mr. Chairman, I ask unanimous consent that Mr. Solomon's letter be entered into the record.

Mr. WALDEN. Without objection.

[The information appears at the conclusion of the hearing.]

Mr. WAXMAN. I hope our discussion today will include consideration of whether today's video marketplace is making diverse and independent content available to all Americans. I am proud that my congressional district also includes the headquarters of DIRECTV, the second largest TV—the second largest video distributor in the United States, now serving over 20 million subscribers. Not only does DIRECTV have approximately 3,000 employees based in El Segundo, California, the company operates 100 percent California-made satellites, some of which were also produced in my congressional district. As one of the satellite providers that this legislation was originally designed to assist, DIRECTV can educate the subcommittee about why it believes the Act should be reauthorized, what aspects of STELA are working well, what parts of the law might need to be modified. And I want to extend a special welcome to our witness from DIRECTV, Mr. Palkovic.

Thank you to all the panel members who are here today. We look forward to you testimony, your continued engagement as we move forward with this reauthorization.

Mr. Chairman, since I have 35 seconds, I will be pleased to offer it, although there didn't seem to be takers when other time was available, but anybody that wants it can have it. If not, I will yield it back.

Mr. WALDEN. Gentleman yields back the balance of his time, and that takes care of our opening statements, and we will move on now to the testimony from our distinguished panel of witnesses.

We will start first with Mr. Mike Palkovic, who is the Executive Vice President for Services and Operations at DIRECTV. Thank you for being here this morning. Again, pull those microphones up

close, turn them on, and the time is yours, sir. You have to turn it on. This is not a retrans issue.

STATEMENTS OF MIKE PALKOVIC, EXECUTIVE VICE PRESIDENT, SERVICES AND OPERATIONS, DIRECTV; MARCI BURDICK, SENIOR VICE PRESIDENT OF BROADCASTING, SCHURZ COMMUNICATIONS, INC.; BEN PYNE, PRESIDENT, GLOBAL DISTRIBUTION, DISNEY MEDIA NETWORKS; AMY TYKESON, CEO, BENDBROADBAND; HAL SINGER, MANAGING DIRECTOR, NAVIGANT ECONOMICS; AND GEOFFREY MANNE, SENIOR FELLOW, TECH FREEDOM

STATEMENT OF MIKE PALKOVIC

Mr. PALKOVIC. Sorry about that.

Mr. WALDEN. There you go.

Mr. PALKOVIC. OK. Chairman Walden, Ranking Member Eshoo, and members of the committee, thank you for inviting DIRECTV to discuss reauthorizing the Satellite Television Extension and Localism Act, STELA.

As we speak, millions of Americans are leaving for vacation. Packing lists include grills, sunblock, and summer reading. Increasingly, they also include television. The very idea that someone could take TV to the beach would have been unimaginable when Congress passed the 1992 Cable Act. Viewers today expect the content they want, when they want it, where they want it, on the device of their choosing, and at prices they can afford. And for the most part, they get it, but there is one exception to this good news: broadcast television.

Unlike other forms of television, broadcasting remains governed by antiquated laws designed to favor the broadcaster over the viewing public. We hear more complaints about broadcast-related issues than almost anything else. Our subscribers complain about high prices, lack of choice, and blackouts. Much of this results from the outdated retransmission consent regime created in the '92 Cable Act.

There are three major problems with this broken system. First, retransmission consent raises prices. Between 2010 and 2015, DIRECTV's retrans costs will increase 600 percent per subscriber. These cash payments are on top of the enormous fees we already pay the broadcasters for cable channels that were tied to the retrans negotiations, otherwise referred to as bundling.

Second, retransmission consent limits choice. The retrans regime has led to the consolidation and bundling of cable channels by broadcast owned media conglomerates. In 1992, the broadcasters owned four cable channels. Today, they own over 104 cable channels, a 2,500 percent ownership increase. For example, in 1992 NBC owned one channel, CNBC. Today, Comcast NBC Universal owns 22 cable channels, plus 11 regional sports networks. These corporations use the retrans process to force our customers to take and pay for all of their channels, regardless of whether they watch them or not.

The third major problem and the most frustrating for consumers is retrans related blackouts. Broadcasters use blackouts to drive price increases and deny consumers access to what was once free

programming. Last year alone, broadcasters pulled the plug in 91 markets.

We see two paths ahead as Congress considers STELA reauthorization. One path is to eliminate these laws entirely. Representative Scalise's bill, the Next Generation Television Marketplace Act, does this. We believe this approach is better than today's hodgepodge of aging regulation.

The other possibility would be to make existing laws smarter. To do so, we strongly believe Congress should address blackouts. First, in light of the fact that broadcasters use the public spectrum, an outright ban on local blackouts should be considered. Alternatively, Congress could allow us to provide our customers with distant network signals during a blackout. If the broadcaster's local content is as important to consumers as they claim, then distant networks would be a poor substitute, and then we would have every incentive to negotiate a carriage deal. Finally, Congress could allow broadcasters to negotiate directly with consumers. Broadcasters would simply set their rates, publish them, and we in turn would charge customers the price the broadcaster set. A consumer could, for example, choose ABC and NBC but opt out of CBS and FOX, as they do today with HBO and Showtime. This would end blackouts, allow for consumer choice, and allow the networks to charge as much as they think their content is worth.

Let me also address Senator McCain's ala carte legislation. This bill demonstrates the growing frustration over the rising cost of content and the inability of consumers to make programming choices. Over the years, we have tried in vain to negotiate more choice and packaging flexibility for our customers. The broadcast corporations either outright refuse or make offers that could best be described as hollow. The result, though, is always the same. Higher prices for consumers and forced bundles of channels they don't want or can't afford. We believe the marketplace is best suited to resolve this conflict. Ideally, we would like to work with the broadcast companies to give consumers what they want, more choice over their programming. However, if these media companies continue to reject calls for packaging flexibility, they leave us no option but to support government intervention.

In closing, I cannot emphasize enough that the status quo no longer works for the American viewing public. We speak with over 300,000 of our subscribers every day, and they tell us they want change. While DIRECTV is not wedded to any particular approach, we do believe congressional action is needed. We stand ready to work with you to explore all proposals. Thank you, and I look forward to your questions.

[The prepared statement of Mr. Palkovic follows:]

DIRECTV

Testimony of

Michael W. Palkovic
Executive Vice President, Services & Operations

On

"The Satellite Television Law: Repeal, Reauthorize, or Revise?"

Before the

House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology

June 12, 2013

Good Morning, Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee, I appreciate the opportunity to testify today. My name is Mike Palkovic, and I am the Executive Vice President of Services and Operations of DIRECTV.

The summer of 2013 is here. Americans are heading out on vacation, weekend getaways, and family gatherings. They will bring with them grills, refreshments, sunblock, and summer reading. They will also bring their favorite television shows and movies. Today, consumers demand the programming they want, when they want it, where they want it, on the device of their choosing, and at prices they can afford. For the most part, they get it.

The very idea that someone could take television to the beach would have been unimaginable twenty years ago. Actually, just about all of today's video marketplace would have been unrecognizable back then. From its first satellite in 1993 to TV Everywhere today, DIRECTV has played a big role in this transformation.

Unfortunately, one subset of television, over-the-air broadcast television remains governed by laws that have not kept up with these changes. These outdated laws work for the broadcasters, but not for the American viewing public. Broadcast television has gotten far too expensive. It is often unavailable where consumers want it, when they want it. Customers are forced to buy unwanted programming to get it, and the broadcast industry increasingly takes it away from viewers in "blackouts."

The growing tension between innovation and stale broadcast regulation has landed repeatedly in federal court. But this problem will not be solved in a courthouse. Only Congress can address it.

We see two paths that the 113th Congress should consider as it works to reauthorize the Satellite Television Extension and Localism Act (STELA). One is to jettison broadcast regulation altogether and create a truly free market in which broadcast programming is no longer treated differently than every other type of programming. The other is to make the laws smarter to reflect the 21st century video marketplace. Neither is easy, but the task is long overdue. DIRECTV is ready and eager to work with this committee and the entire Congress as we renew STELA to improve the video experience for all consumers.

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Congress last tackled major reform of the television marketplace in 1992. The 1992 Cable Act in turn expanded on decades of intervention by Congress, including the 1976 Copyright Act, the 1984 Cable Act, and the first Satellite Home Viewer Act in 1988.

But so much has changed since then and the pace continues to quicken. Consider the recent history of the video marketplace (for a complete timeline, please see **Attachment A**):

1980	28 national cable networks
1985	FOX Broadcasting established
1990	57% of homes subscribe to cable; 79 cable nets

1993 First DIRECTV satellite, DBS-1 launches

1994 DIRECTV's first customer purchases a system in Jackson, MS at Cowboy Maloney's

1995 1 million DIRECTV subscribers

1996 Residential cable broadband introduced; WRAL-HD broadcasts the 1^{st} public HD signal

1998 171 cable nets; DIRECTV is first national provider to use 5.1 channel Dolby Digital surround sound; DIRECTV grows to 4 million subscribers

2000 65 million cable subscribers; DIRECTV TiVo service is launched, laying the foundation for the DVR revolution

2001 DIRECTV grows to 10 million and launches its first "spot beam" satellite to serve 40 local TV markets; average adult watches 4 hours of TV a day

2004 98% of homes have a TV; DIRECTV receives 1^{st} Primetime Emmy in Interactive TV for its enhanced NFL Sunday Ticket

2005 Verizon launches FiOS TV; YouTube launched; Netflix has 4.2 million subscribers; DIRECTV reaches 15 million subscribers

2006 115 million homes have access to high speed internet; 800 cable nets; AT&T U-verse launches in San Antonio, Texas; Amazon Unbox launched

2007 Netflix adds streaming service and totals 7.5 million subscribers; DIRECTV launches 21 national HD channels becoming the HD content leader

2008 1 million FiOS subscribers; Hulu launches; Netflix partners with Xbox 360, Blu-ray, and Apple to deliver streaming content

2009 DIRECTV DVR Scheduler App is launched on iPhone and iTouch; June 12th Digital Transition of broadcasters; DIRECTV reaches 18 million subscribers; Netflix partners with PS3, Internet TV, and other Internet connected devices to deliver content, reaches 12.3 million subscribers

2010 DIRECTV launches 3D TV channels; Roku and Vimeo partner to bring video to TV; Boxee Box released

2011 3.4 million U-verse subscribers; Microsoft launches Xbox Apps Marketplace to 40 million users; Roku reaches 1 billion streams of content to the TV

2012 Aereo launches; 93% homes have cable broadband access; 4.5 million U-Verse subscribers; 5 million FiOS subscribers; 20 million DIRECTV subscribers; Boxee Cloud DVR launched; DISH launches Autohop and PrimeTime Anytime

2013 Roku surpasses 700 channels; Verizon/Redbox JV launched public beta; YouTube launches paid subscription service; Aereo launches in Boston and Atlanta; DISH launches the Hopper with Sling; Google Fiber announced for Kansas City and Austin; Netflix reaches 29 million US subscribers

So I think it's fair to say that those who passed the 1992 Cable Act would not recognize the video marketplace of today. If I had to distill all of these changes in the last twenty years into three key trends, I'd list the following:

First, in 1992, cable was the only game in town. If you wanted anything beyond over-the-air television, you had no place to go other than your cable operator. Today, most customers can

choose from cable, satellite, and telco, not to mention offerings like Netflix, Roku, Boxee, Xbox and Hulu.

Second, in 1992 you watched television *on* your television. Now, you can watch "TV" on computers, tablets, phones, and just about every other device imaginable.

Third, so much more content is available than before. In 1992, there were four networks and approximately seventy cable channels. Today, there are more than 900 cable channels and an endless amount of video available online.

This sounds like a success story. And it is.

But there is one exception to this good news: broadcast television. We hear more complaints about broadcast related issues than almost anything else. Our subscribers complain about high prices, lack of choice, and blackouts. If DIRECTV's 20 million subscribers are any indication, the American viewing public is not as happy today about broadcasting as they were in 1992.

Much of this is because of the 21-year-old Cable Act and the retransmission consent regime it created.

First, **retransmission consent raises prices.** As I have said, there is much more competition now in pay-TV than there was in 1992. Competition normally drives down prices. But, as the

Congressional Research Service recently put it, "[i]ronically, the market consequence of greater competition in the distribution of video programming appears to be greater negotiating leverage for programmers with popular — and especially must-have — programming, resulting in higher programming prices that MVPDs tend to pass through at least partially to subscribers." [Congressional Research Service (July 2007)].

Staggering rate hikes are the result of this imbalance. To illustrate; between 2010 and 2015, DIRECTV's retransmission consent costs will increase ***600% per subscriber.*** These cash payments are on top of, not in lieu of, the enormous fees we already pay the broadcasters for cable channels that were tied to the retransmission consent negotiations.

Second, **retransmission consent limits choice.** The retransmission consent regime has led to the consolidation and bundling of cable channels by broadcast-owned media conglomerates. In 1992, the broadcasters owned 4 cable channels. Today, they own over 104 cable channels, a ***2,500% ownership increase*** **(Attachment B)**. For example, in 1992, NBC owed one channel, CNBC. Today Comcast/NBCUniversal owns 22 cable channels, plus 11 regional sports networks. These broadcasting conglomerates use the retransmission consent process to force the vast majority of our customers to take and pay for all of their channels. Such bundling not only frustrates consumers but leads to higher costs for larger bundles that consumers often don't want and sometimes can't afford.

Third, **retransmission consent leads to blackouts.** Broadcasters increasingly use blackouts and the threat of blackouts to drive price increases and deny consumers access to what was once free network programming. As shown in **(Attachment C)**, broadcasters pulled the plug in 12 markets in 2010, 51 in 2011, and 91 last year.

The authors of the 1992 Cable Act cautioned against this tactic. The late Senator Inouye stated during Senate debate on January 30, 1992 (138 Cong. Rec. S643):

> *MR. INOUYE. ... the FCC should monitor the workings of this section following its rulemaking implementing the regulations that will govern stations' exercise of retransmission consent so as to identify any such problems. If it identifies such unforeseen instances in which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem. I assure my friend that my colleagues on the committee and I will make certain that the FCC uses its authority to prevent any such impasses from becoming permanent and frustrating the achievement of our goal to maximize local service to the public.*

In sum, the 1992 Cable Act has maximized broadcasters' leverage to levels unforeseen by its authors. The results for a consumer are higher prices, lack of choice and a total of 154 "loss[es] of local programming."

Nor is the 1992 Act alone in distorting the television marketplace to the detriment of consumers. Nearly four decades of protections, preferences and carve outs have been layered on top of each other, creating a maze of laws that require teams of lawyers to understand. These include:

- Must-carry/carry-one, carry-all (47 U.S.C. §§ 534-35, 338)
- Special copyright protections, including the ability to step into the shoes of upstream copyright holders and enhanced damages for violations (17 U.S.C. § 501(c)-(d); 17 U.S.C. § 119 (a)(6))
- Ability for a single station to negotiate retransmission consent for multiple stations in a market, either through "shared services agreements" and similar arrangements or thorough multicast carriage (The legality of SSAs and other similar arrangements remains in question. See Amendment of the Commission's Rules Related to Retransmission Consent, 26 FCC Rcd. 2718 (2011).)
- Signal quality requirements (47 U.S.C. § 534(b)(3)(B)(4); 47 U.S.C. § 338(j))
- Channel placement and "neighborhooding" requirements (47 U.S.C. § 534(b)(3)(B)(6); 47 U.S.C. § 338(j))
- "Two dish" restrictions (47 U.S.C. § 338(g))
- Must-buy provisions for cable operators (47 U.S.C. § 543(b)(7))
- Network Nonduplication and syndicated exclusivity (47 C.F.R. § 76.92-95 (Cable Network Nonduplication Rule) 47 C.F.R. § 76.122 (Satellite Network Nonduplication Rule) 47 C.F.R. § 101-110 (Cable Syndicated Exclusivity) 47 C.F.R. § 123-125 (Satellite Syndicated Exclusivity))

- Notice requirements that apply before broadcast programming is moved (47 U.S.C. § 534(b)(9))
- A prohibition on distributors dropping broadcast programming during "sweeps weeks" (47 U.S.C. § 534(b)(9))

Every single one of these rules gives special privileges to broadcasters. These privileges do not apply to cable networks, Internet programming, or any other kind of video product other than broadcasting.

Congress must address the imbalance created by decades of regulatory underbrush clogging the video marketplace. Outdated laws harm consumers. They limit choice, deny channels, and drive unsustainable price increases.

As stated earlier, I see two paths forward as you reauthorize STELA. One path is to eliminate these laws entirely. Representative Scalise's bill, the Next Generation Television Marketplace Act, does this. His legislation does not seek to balance the benefits and obligations of regulation. Instead, the bill seeks to start over with *no* regulation.

We applaud Mr. Scalise's leadership and initiative. While it may not be the final destination of this committee and the 113th Congress, exploring complete and unbiased deregulation will ultimately benefit the consumer. Decades of government intervention will not be corrected overnight by an unbound market. But make no mistake about the current TV marketplace; it is

not a free market by any stretch. Contrary to repeated broadcaster assertions, the only thing "free" about this market is the significantly underutilized spectrum granted to broadcasters by the government.

The Scalise legislation is also elegant in its simplicity. By removing all government preferences, including the statutory copyright licenses DIRECTV itself relies on, it treats everyone the same and creates deregulatory parity. Cable, telco video, and satellite would operate under the same rules as our numerous Internet competitors, that is, none.

DIRECTV has thrived in today's highly regulated market. We think we could also succeed in a completely deregulated market, if we maintain our focus on the consumer.

The other path is to make the laws we have smarter. Here, of course, there are numerous proposals. Just as our success depends on delighting subscribers that choose DIRECTV, we think any changes must be driven by what is best for the consumer. Let me talk about a few of the most promising ideas.

First, Senator McCain recently introduced S. 912, the Television Consumer Freedom Act of 2013 or so called *a la carte* legislation. This legislation demonstrates the growing frustration over the rising cost of content and the inability of consumers to choose the programming they want. Over the years, we have tried in vain to negotiate more choice and packaging flexibility for our customers. The media conglomerates either outright refuse, or make offers that can best be

described as hollow. For example, they might charge as much, or more, for one of their most popular channels as they would for the entire bundle. The result is always the same: higher prices for consumers and the same forced bundles of channels they may not want and sometimes can't afford.

We believe the marketplace is best suited to resolve this conflict. Ideally, we would like to work with the content companies to give consumers what they want: more choice over their programming. However, if the media conglomerates continue to reject calls for packaging flexibility, then they leave us no option but to support government intervention. The *status quo* is simply unacceptable.

Second, Congress could address blackouts directly. It could, of course, simply prohibit them in light of the fact that [the] broadcasters are using the public's spectrum. Or it could permit pay-TV providers to deliver replacement distant signals during local blackouts. Subscribers would pay for the distant network programming just as they do now.

The broadcasters claim their local content is enormously important to consumers. If this is true, then distant network programming would be a poor substitute, and we would have every incentive to negotiate a carriage deal for the local programming. Either way, this proposal supports Congress' long-standing policy objective of ensuring all consumers have access to network programming.

Third, Congress could allow broadcasters to negotiate directly with consumers, getting rid of the pay-TV middleman. Broadcasters would simply set their rates and publish them. We would offer the stations at the published price on an individual basis and pass the cost directly to subscribers. A consumer could, for example, choose ABC and NBC, but opt out of CBS and FOX, as they do today with HBO and Showtime. This would end blackouts, allow for consumer choice, and allow broadcasters to charge as much as they think consumers will pay for their content. In some ways, this would create the most "free" market of all, as broadcasters could set whatever prices they wanted and their viewers could accept or reject those prices. DIRECTV is not wedded to any of these particular approaches. We are open to other, new ideas. But the *status quo* no longer works for consumers.

DIRECTV has brought competition in pay-TV where there was once none. We have succeeded by relentlessly focusing on, and serving the consumer. We have tried to bring this same approach to our delivery of broadcast programming, but ossified laws and regulations stand in the way. We stand ready to work with this committee and the entire Congress as we renew STELA.

Attachment A

HISTORY OF THE VIDEO MARKETPLACE

1934

Communications Act[1]

1936

There are only about 200 TVs in use worldwide[2]

1941

FCC authorizes commercial TV broadcast[3]

There are about 7,000 TV sets in the U.S.[4]

1946

First broadcast TV signal in color demonstrated to FCC by CBS[5]

1948

John Walson launched the first commercial cable television system in Mahanoy City, Pennsylvania[6]

Cable services deliver broadcast channels to communities in Oregon, Arkansas, and Pennsylvania[7]

1950

About 9,735,000 TV sets in the U.S. or 9% of households[8]

1952

70 cable systems serve 14,000 subs in rural areas[9]

1954

First nationwide color TV broadcast in U.S. Tournament of Roses parade[10]

1962

The FCC restricted a cable operator's actions in the Carter Mountain Transmission Corp v. FCC case when it denied the Riverton, Wyoming cable company permission to import distant broadcasters' signals[11]

1963

For the 1st time Americans say they get more news from TV than newspapers[12]

1966

The FCC required cable operators operating in the 100 largest television markets (where 87 percent of the U.S. population then lived) to obtain formal permission—which almost never was granted—before importing distant signals[13]

1970

First cable programing networks emerge[14]

PBS network established[15]

1972

First pay-TV network - Home Box Office (HBO), owned by Time Warner[16]

FCC issued standards for the number of broadcast station signals that should be available in a community[17]

1977

C-SPAN launched[18]

1979

Nickelodeon (Viacom) & ESPN (The Walt Disney Co.) launched[19]

1980

Explosion of cable network options continues (28 networks), including 24/7 Cable News Network (CNN) owned by Time Warner[20]

1981

MTV (Viacom) launched[21]

1984

Cable Act of 1984[22]

FCC grants Hughes Communications Galaxy the authority to construct a DBS system[23]

1986

Fox Broadcasting established[24]

1990

57% of households subscribe to cable video service (79 cable networks)[25]

1992

Cable Act of 1992[26]

Construction begins on the DIRECTV Castle Rock Broadcast Center in Colorado[27]

1993

First DIRECTV satellite, DBS-1 launches[28]

1994

99% of U.S. households have at least 1 TV[29]

DIRECTV's first customer, LeMoine Martin, purchases a DSS system at Cowboy Maloney's in Jackson, MS[30]

ABC's *World News Now* was the first television show to be broadcast over the Internet[31]

1995

DIRECTV receives its first technical Emmy Award for its outstanding achievement in developing digital DBS technology[32]

DIRECTV activates 1,000,000th customer[33]

1996

Telecommunications Act of 1996[34]

Cable residential broadband introduced[35]

In just 2 years DIRECTV grows from 1 satellite to 3, 60 channels to 175+, 27 retailers to 25,000+, 1 manufacturer to 10, and 79 subs to 1.6 million[36]

Dish Network officially began operations as a service of EchoStar[37]

WRAL-HD broadcast the 1st HD signal to the public[38]

DIRECTV activates 2,000,000th customer. Ranks 7th in the pay-TV market[39]

Approximately 1 billion TVs in use worldwide[40]

1998

Cable networks nearly triple in less than a decade (171 cable networks)[41]

DIRECTV becomes 1st national provider to deliver programming w/ 5.1 channel Dolby Digital surround sound[42]

DIRECTV broadcasts the 1st coast-to-coast HD TV demonstration[43]

1999

DIRECTV completes the acquisition of U.S. Satellite Broadcasting and surpasses the 7 million customer mark[44]

DIRECTV PARA TODOS debuts for Spanish speaking customers[45]

DIRECTV 1-R launches from a Sea Launch platform in the Pacific Ocean (1st commercial launch for Sea Launch consortium)[46]

DIRECTV commences local broadcast network channels in its first two local channel markets NY & LA[47]

Netflix launches its rental subscription service[48]

2000

65 million cable subs[49]

Fiber rich networks widely deployed[50]

DIRECTV receiver with TiVo® service is launched laying foundation for DVR revolution[51]

2001

DIRECTV GOES TO SCHOOL launches free programming for K-12 schools (Today the service reaches more than 6,500 schools)[52]

DIRECTV activates it 10,000,000th customer[53]

DIRECTV launches 4S, its first spot-beam satellite providing capacity for 225 channels, which is mainly used to provide local channels to customers expanding to local footprint to 40 markets[54]

Average American adult watches 4 hours of TV daily[55]

2002

DIRECTV ranked highest in customer satisfaction by the American Customer Satisfaction Index for 1st time[56]

DIRECTV receives the J.D. Power & Associates number one ranking for customer satisfaction among cable & DBS subs[57]

Roku, Inc. founded[58]

Netflix ends the year with 857,000 U.S. subs up 88% from 2001[59]

2003

DIRECTV activates its 12,000,000th customer[60]

2004

DIRECTV receives 1st Primetime Emmy Award for Outstanding Achievement in Interactive TV for its enhanced NFL Sunday Ticket® programming[61]

More than 98% of American households have a TV & the average home has more than 2[62]

2005

YouTube launched[63]

DIRECTV 8, the 10th satellite in company history launches[64]

Verizon launches FiOS TV[65]

Spaceway 2 launches, supporting the expansion of HD programming[66]

DIRECTV activates its 15,000,000th customer[67]

Netflix ends the year with 4.2 million U.S. subs up 60% from 2004[68]

2006

DVRs and VoD enhance viewing options[69]

115 million American homes with access to ultra-fast broadband networks[70]

800 cable networks[71]

High-definition TV, digital phone, high-speed Internet access offered throughout U.S.[72]

AT&T U-verse launches commercially in San Antonio[73]

Amazon Unbox launched (precursor to Amazon Instant Video)[74]

2007

13,000 AT&T U-verse customers in service with the fiber-rich network passing more than 2.8 million living units[75]

AT&T U-verse OnTheGo introduced[76]

DIRECTV Sat-Go goes on sale as the world's first portable satellite TV system[77]

DIRECTV 10 launches to prepare for historic HD programming capacity expansion[78]

DIRECTV launches 21 national HD channels, becoming the HD leader[79]

Netflix adds streaming service and ends year with 7.5 million U.S. subs up 18% over 2006[80]

2008

1 million Verizon FiOS TV subs[81]

DVR Scheduler debuts allowing customers the ability to schedule DVR recordings from their mobile phone or computer[82]

Hulu launches[83]

Roku Announces the Netflix Player by Roku[84]

DIRECTV on DEMAND becomes available to customers nationwide[85]

Netflix partners with Xbox 360, Blu-ray, TV set-top boxes, and Apple to deliver streaming content[86]

Netflix available on Xbox transforms Xbox from gaming device to family TV device[87]

2009

Digital TV Transition, June 12th[88]

Amazon on Demand available on Roku[89]

DIRECTV DVR Scheduler App for the Apple iPhone & iTouch is launched immediately becoming one of the most popular Apps[90]

DIRECTV activates its 18,000,000th customer[91]

Netflix partners with PS3, Internet TVs and other Internet connected devices to deliver streaming content[92]

Netflix ends the year with 12.3 million U.S. subs up 31% over 2008[93]

2010

3 million Verizon FiOS TV subs[94]

Roku partners with UFC to deliver live and on demand in HD[95]

3D-at-home revealed at 2010 CES[96]

DIRECTV 1st provider to launch 3D & provides free access to all HD customers[97]

3D broadcast of MLB on FiOS[98]

Netflix becomes available on iPad, iPhone, iPod, and Nintendo Wii among other Internet connected devices[99]

Roku and Vimeo team up to bring video to TV[100]

Roku announces content partnership with Hulu[101]

Roku and NHL bringing NHL GameCenter LIVE to TV[102]

Boxee Box released[103]

2011

Comcast receives approval for NBC Universal merger[104]

Roku reaches 1 billion streams of content to the TV[105]

Roku upgrades Crackle Channel to deliver full-length movies and TV shows[106]

Roku enters retail with nationwide availability at Best Buy[107]

Roku hits 15 million channel downloads[108]

Roku expands to Wal-Mart[109]

3.4 million U-verse TV subs[110]

Disney short-form videos available on Roku[111]

Roku introduces new $49 streaming player[112]

HBO GO launching on Roku[113]

Microsoft launches Xbox Apps Marketplace to 40 million Xbox LIVE users coupling gaming with digital content delivery[114]

2012

Aereo launches[115]

DISH launched Autohop and PrimeTime Anytime[116]

DISH and Roku ink strategic partnership for international programming[117]

Spotify music service launches on Roku[118]

93% of American households have access to cable broadband[119]

$200 billion has been invested in networks and infrastructure since 1996[120]

4.5 million U-verse TV subs[121]

Boxee Cloud DVR launched[122]

2013

Verizon / Redbox JV launched public Beta[123]

Roku surpasses 700 channels[124]

TWC TV launching on Roku[125]

DISH launched the Hopper with Sling[126]

Google announced Google Fiber for Kansas City, KS and Austin, TX[127]

Netflix reaches 29.17 million U.S. subs[128]

Roku 3 introduced[129]

AT&T launches Digital Life Home Security & Automation joining Comcast, TWC, and Verizon[130]

YouTube launches paid subscription service[131]

Aereo launches in Boston and Atlanta metro regions[132]

CenturyLink gaining traction with its Prism IPTV service; Now at 120,000 subs[133]

EPA Names DIRECTV 2013 ENERGY STAR® Partner of the Year[134]

DIRECTV Tops DISH and AT&T U-verse to continue 13-year winning streak over cable in 2013 American Customer Satisfaction Index[135]

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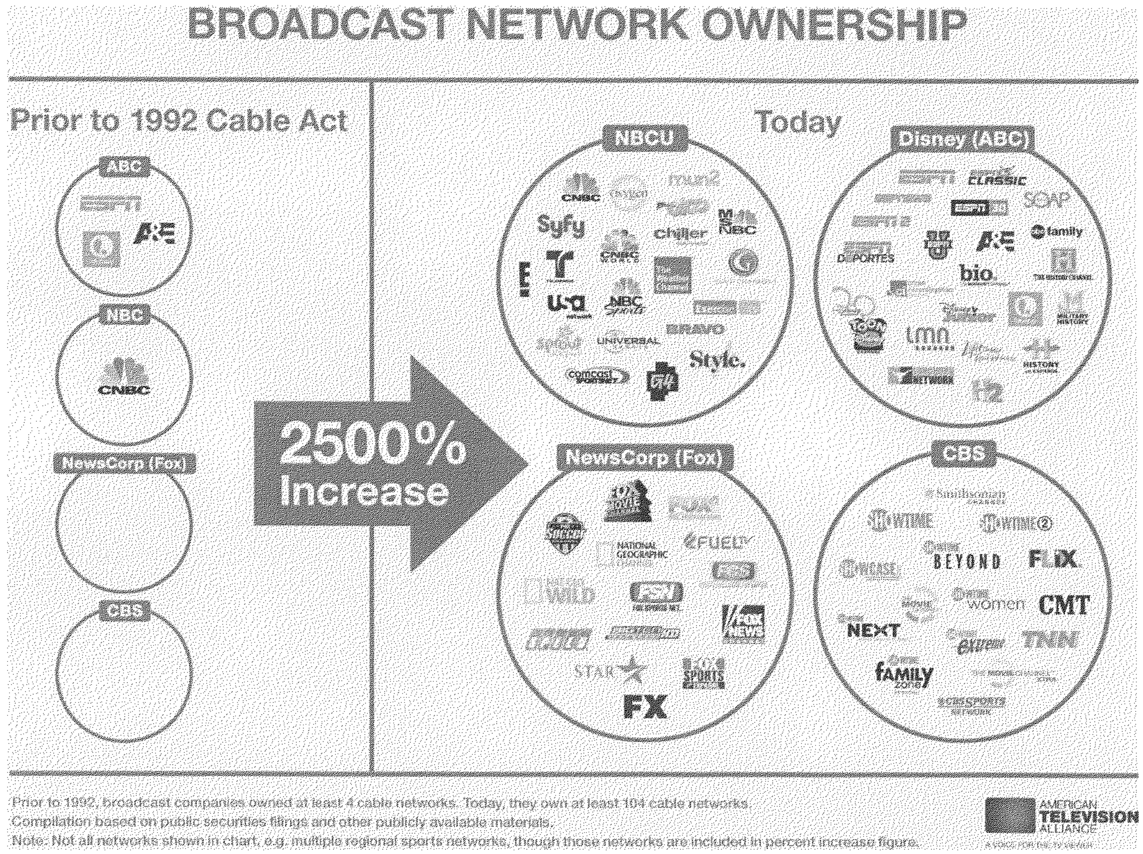
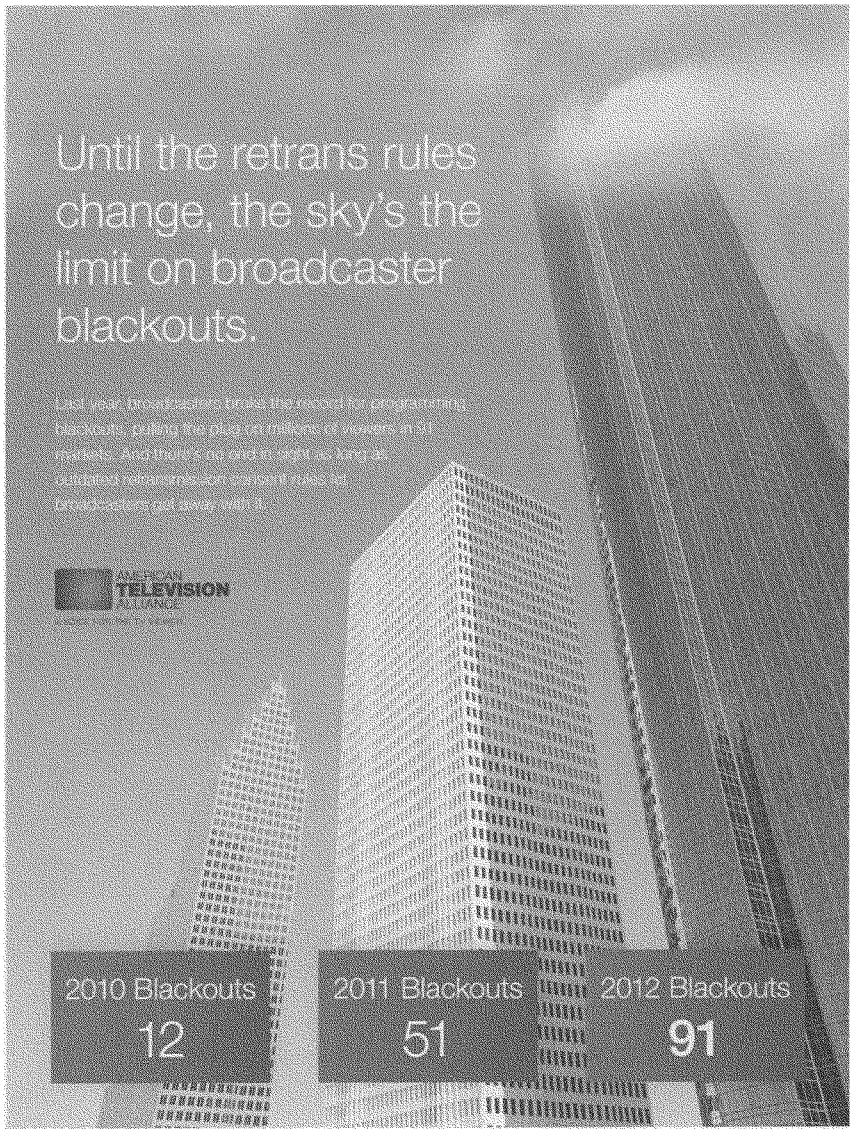
Attachment B


BROADCAST NETWORK OWNERSHIP
Prior to 1992 Cable Act
ABC
NBC
NewsCorp (Fox)
CBS
2500% Increase
Today
NBCU
Disney (ABC)
NewsCorp (Fox)
CBS
Prior to 1992, broadcast companies owned at least 4 cable networks. Today, they own at least 104 cable networks.
Compilation based on public securities filings and other publicly available materials.
Note: Not all networks shown in chart, e.g. multiple regional sports networks, though those networks are included in percent increase figure.
AMERICAN TELEVISION ALLIANCE

Attachment C


Until the retrans rules change, the sky's the limit on broadcaster blackouts.
Last year, broadcasters broke the record for programming blackouts, pulling the plug on millions of viewers in 91 markets. And there's no end in sight as long as outdated retransmission consent rules let broadcasters get away with it.
AMERICAN TELEVISION ALLIANCE
2010 Blackouts 12
2011 Blackouts 51
2012 Blackouts 91

BROADCASTER RETRANS BLACKOUTS 2010-2013
(as of April 29, 2013)

DATE	STATION OWNER	Provider	STATIONS	CITIES
6-Mar-10	Disney	Cablevision	ABC	New York, York New Jersey , Philadelphia, Connecticut
September 2 – September 16, 2011	Citadel Communications	Time Warner Cable	ABC	Lincoln, NE
October 15 - October 30 2010	News Corp	Cablevision	FOX	New York, New Jersey, Philadelphia, Connecticut
Dec 15 – January 7, 2011	Smith Media LLC	Time Warner	NBC and CW-11	Burlington/Plattsburgh and Utica, VT and NY
Dec 16 2010-Dec 30 2010	Chambers	DISH	ABC	Oregon
Jan 1 2011 – Jan, 7 2011	KOMU	Mediacom	NBC & CW	Columbia, MO
Jan 1 - February 2, 2011	Northwest	DIRECTV	Fox	Yakima and Spokane WA, Medford, OR & Binghamton, NY
Jan 1 – Jan, 15 2011	Frontier Radio	DISH	Fox & ABC	Central Georgia (Macon)
March 5 – March 14, 2011	LIN Media	DISH	CBS, FOX, NBC, CW and MyNetwork affiliates	17 markets: Albuquerque, N.M.; Austin, Texas; Buffalo, N.Y.; Columbus, Ohio; Dayton, Ohio; Fort Wayne, Ind.; Grand Rapids, Mich.; Green Bay, Wis.; Indianapolis; Lafayette, Ind.; Mobile, Ala.; New Haven, Conn.; Norfolk, Va.; Providence, R.I.; Springfield, Mass.; Terre Haute, Ind.; and Toledo, Ohio
March 31 – June 2, 2011	Woods Communications	DISH		Montgomery, AL

March – May 2011	WUNI-TV	Full Channel	Univision	Rhode Island viewers of Worcester, MA station
May 2 – June 21, 2011	WCOV Fox20	DISH	Fox	Montgomery – Selma, AL
July 1 – October 14, 2011	ComCorp	DISH	Fox	Evansville, IN
August 31 – October 15, 2011	LIN Media	Mediacom	ABC, CBS, Fox, NBC, CW affiliates	Mobile-Pensacola; Grand Rapids – Kalamazoo – Battle Creek; Green Bay – Appleton; Ft. Wayne; Lafayette; Terre Haute; Norfolk
September 3 – September 11, 2011	Prime Citites	DISH		Minot/Bismarck/Dickinson, ND
October 31, 2011 – Dec 21, 2011	Sarkes Tazian	DISH	NBC, CBS	Chattanooga; Reno
Dec 12, 2011 – May 25, 2012	Cordillera Communications	Time Warner Cable	NBC, Telemundo, CW South Texas	Corpus Christi
Dec 15 – Dec 21, 2011	Heritage Broadcasting	DISH	CBS, Fox	Traverse City, MI
Dec 31, 2011 – February 2, 2012	Rapid City Broadcasting	DISH		Rapid City, SD
January 1, 2012 (Settled)	Jackson/Lingard/Southern	DISH	ABC, Fox, NBC	Columbus-Tupelo, Mississippi
January 1, 2012 – May 1, 2012	Wyomedia/Silverton/Mark III	DISH	Fox, ABC, and CBS	Casper, WY
January 1, 2012 – May 1, 2012	Wyomedia/Silverton/Mark III	DISH	Fox, ABC	Cheyenne, WY
Jan 1, 2012 – February 2, 2012	KNBN	DISH	NBC	Rapid City, SD
January 1, 2012 –	**Allbritton**	**Shentel**	**ABC**	**Suburban Washington, DC**
Jan 5 – Feb 17, 2012	Hoak Media	Golden West	ABC	Sioux Falls, SD
Jan 13 – January 26, 2012	Sunbeam Television Corp	DirecTV	Fox, NBC	Miami; Boston

Jan 13 – Jan 15, 2012	Newport Television	Verizon FiOS	CBS, CW Television, My Network, ABC, Fox	Harrisburg, Pa; Syracuse, NY; Albany, NY
Jan. 27, 2012 – May 10, 2012	Turner Broadcasting System	DISH	Independent	Atlanta
Jan. 31 – Feb 21, 2012	Louisiana Media	DISH	Fox	New Orleans
Jan 31 – February 4, 2012	Eagle Creek	DISH		Laredo, TX
February 29 – March 9, 2012	Bayou City Broadcasting	DISH	Fox	Abilene, TX and San Angelo, TX
March 16 – March 17, 2012	Murphy Media	DISH	CBS, ABC, My Network	Yakima , WA; Spokane, WA; LaCrosse – Eau Claire, WI; Madison, WI
March 31 – April 5, 2012	Tribune	DirecTV	independent stations, Fox, ABC and The CW affiliates	*19 Markets:* Los Angeles – Sacramento – San Diego, CA; Denver; Hartford, CT; Miami – Fort Lauderdale, FL; Chicago; Indianapolis; New Orleans; Grand Rapids, MI; St. Louis, MO; New York, NY; Harrisburg – Philadelphia, PA; Portland, OR; Dallas – Houston, TX; Seattle, WA; Washington D.C.
April 1 – April 13, 2012	Pappas Telecasting	DirecTV	Fox, ABC, CW, Azteca	Lincoln, NE; Omaha, NE; Des Moines, IA; Yuma, AZ
April 9, 2012 – May 16, 2012	Prime Cities Broadcasting, Inc.	Midcontinent Communications	Fox	Bismarck, ND
May 31, 2011 – June 6, 2012	Block Communications	Time Warner Cable	Fox, MyNetworkTV	Louisville, KY
June 5 – July 3, 2012	Diversified Communications	DirecTV	CBS, CW, ABC	Bangor ME; Gainesville, FL

June 7 – June 13, 2012	Hoak Media	DISH	ABC, CBS, Fox, NBC	Grand Junction, CO; Fargo, ND; Panama City, FL; North Platte, NE; Lincoln, NE; Sioux Falls, SD; Monroe, LA; Alexandria, LA
July 1, 2012 – July 18, 2012	West Virginia Media	DISH	NBC, ABC, CBS, Fox	Clarksburg - Weston, WV; Charleston - Huntington, WV; Bluefield - Beckley, WV; Wheeling, WV -Steubenville, OH
July 6, 2012 – July 24, 2012	WFMJ-TV	DISH	NBC	Youngstown, Ohio
July 10, 2012 – July 19, 2012	Hearst	Time Warner Cable	ABC, NBC, CBS and CW affiliates	Hawaii; Boston, MA; Portland, ME; Hartford, VT; Plattsburgh, NY; Winston-Salem, NC; Kansas City, MO; Lincoln, NE; Louisville, KY; Cincinnati, OH and Pittsburgh, PA
August 13, 2012 – October 26, 2012	Northwest Broadcasting	DirecTV	ABC, CBS and NBC affiliates	Spokane, WA; Yakima-Pasco-Richland-Kennewick, WA; Medford-Klamath Falls, OR; Binghamton, NY
August 17, 2012 – October 29, 2012	Tribune Broadcasting	Cablevision	CW, MyNetwork, Fox	New York; Waterbury, CT; Denver, CO; Philadelphia; Hartford, CT
September 4 – September 4, 2012 (1 day)	Dispatch Broadcast	Dish	CBS, NBC	Columbus, OH; Indianapolis, IN
November 26, 2012-January 12, 2013	Northwest Broadcasting	Dish	Fox	Spokane, WA; Yakima, WA; Medford, OR; Binghamton, NY
December 18, 2012-January 25, 2013	Cedar Rapids TV	Dish	ABC affiliate	Cedar Rapids, IA
January 1, 2012-	**Mt. Baker Cable**	**Cox**	**CBS**	**Seattle, WA**

May 30, 2012-	**TVC (InterBel) Morgan Murphy**	**TVC (InterBel)**	**ABC**	**Spokane, WA**
December 12, 2012- January 21, 2013	American Spirit	Buckeye Cable	FOX	Toledo, OH

Total Markets Blacked Out in 2012: 91

Mr. WALDEN. Appreciate your testimony, sir. Thank you for being here.

Now we will turn to Marci Burdick, who is the Senior Vice President of Broadcasting for Schurz Communications, Incorporated. We welcome you back to the committee and we look forward to your testimony.

STATEMENT OF MARCI BURDICK

Ms. BURDICK. Thank you. Thank you, Chairman Walden, and good morning. Ranking Member Eshoo, good morning. Members of the subcommittee, hello. My name is Marci Burdick. I am Senior Vice President, as you heard, of Schurz Communications, where I oversee eight television stations, three cable companies, and thirteen radio stations. I am also the television board chair for the NAB, on whose behalf I testify today.

Local broadcast television remains unique because it is free, it is local, and it is always on, even when other forms of communication fail. Television is the most watched media for high quality entertainment, sports, local news, emergency weather warnings, and disaster coverage. Schurz has television stations in tornado-prone places like Wichita, Kansas and Springfield, Missouri, and I can tell you from my own personal experience our viewers rely on us to stay informed during times of whether emergencies, not unlike the terrible storms we have seen this year.

With that backdrop, thank you for the opportunity to be here today to discuss reauthorization of the Satellite Television Extension and Localism Act, or STELA.

As broadcasters, we approach this debate asking a simple question: is satellite's distant signal compulsory license still in the public interest? We know the universe of distant signals is shrinking, and more and more viewers are receiving their local programming through satellite. Today, DISH provides local into local service in all 210 television markets and DIRECTV in 196. To justify the extension of this law, however, we need more specific information. For instance, how many subscribers rely on the distant signal? How many subscribers are grandfathered, but also receive local into local service? And what is the number of subscribers that receive the distant signal only for use in an RV or a boat? Unfortunately, this information resides only in the hands of DISH and DIRECTV. By digging into these facts, we can have an honest debate about whether the law is still needed.

At a minimum, NAB asks this committee to embrace a clean reauthorization that does not include unrelated and highly controversial provisions that undermine the ability of broadcasters to provide high quality and locally focused content. For example, some would like to use STELA's reauthorization to make drastic changes in a free marketplace negotiation called retransmission consent. I believe such changes would harm consumers.

I have been with Schurz Communications for 25 years, and I come to this hearing with a very unique perspective on the video marketplace. My company is a member of both NAB and ACA. We are a broadcaster and we are a small cable operator. I can tell you from our vantage point as a small company that has been on both sides of the negotiating table, the current system works. So I ask

the subcommittee, if the system isn't broken, why fix it? The retransmission consent system in place today has a success rate of 99 percent. Only in Washington, D.C., could something that works 99 percent of the time, providing for thousands of deals every year, be called broken. This success rate trumps the effectiveness of the best medicines, the free throw percentage of the most accurate basketball player, and the approval ratings of the Dali Llama and the Pope, yet no one would doubt whether they are effective.

The false fixes being suggested by my friends in the cable and satellite industry would not only harm consumers, but would do nothing to improve on the system that we have today. In fact, just the opposite would be true. One proposal would allow the importation of distant, out of market signals in the event of a contractual impasse. In the real world, that means that Congress would negate existing contracts between broadcast networks like ABC and their local affiliates like KOHD in Bend, Oregon, or KGO in the Bay area. If Congress were to allow distant signals to come into local markets, that will have gutted my affiliation contract while leaving viewers in Bend or in the Bay area to receive, perhaps, Los Angeles or Denver news and sports. Additionally, by allowing distant signal importation Congress would be placing its thumb on the bargaining scale by fundamentally skewing the negotiating leverage of the parties. The resulting effect would be more contractual impasses, not less. With fewer viewers and less advertising dollars, the localism that TV broadcasters provide would be compromised. This would ultimately leave your viewers with less local community programming, your local businesses with fewer places to reach local customers through TV advertising, and politicians with no effective medium to reach their constituents. None of this is good for the consumer.

In conclusion, as television broadcasters, we aren't coming to Congress asking for a leg up in our negotiation or for changes to a law to benefit one side or the other. We will fight our own fights, we will make our own deals, and we only ask that Congress not tip the scales in favor of any one industry.

I thank you for inviting me here today, and I look forward to your questions.

[The prepared statement of Ms. Burdick follows:]

NATIONAL ASSOCIATION OF BROADCASTERS

Hearing on "The Satellite Television Law: Repeal, Reauthorize, or Revise?"

United States House of Representatives
Committee on Energy & Commerce
Subcommittee on Communications and Technology

June 12, 2013

Statement of Marci Burdick
Schurz Communications, Inc.
On behalf of the National Association of Broadcasters

Introduction and Summary

Good morning, Chairman Walden, Ranking Member Eshoo and members of this Subcommittee, and thank you for inviting me to testify today. My name is Marci Burdick, and I am the Senior Vice-President, Electronic Division for Schurz Communications, Inc. where I supervise 13 radio stations, three cable companies, eight television stations and have operating partnerships with two additional stations. I hope that my experience with this diverse portfolio can provide insight and perspective on the communications marketplace as I testify today on behalf of the free, local, over-the-air television members of the National Association of Broadcasters (NAB).

Nearly four years after the digital television transition, local television broadcasters reach over 97% of the nearly 120 million households in the U.S. on a weekly basis. More than 54 million Americans, including young people, low-income families, and minorities, rely solely on over-the-air television. Many consumers watch local television through our partnerships with cable and satellite television providers, yet reliance on over-the-air antenna reception continues to grow. With certainty to spectrum access critical to broadcasters' ability to innovate and invest in free, high-quality, locally-oriented service, we thank this Subcommittee for including the necessary safeguards in recent incentive auction legislation and urge you to remain vigilant during the Federal Communications Commission's (FCC) implementation of this important process. I speak for all broadcasters when I say that we look forward to continuing to work with this Subcommittee, the FCC, and other stakeholders in ensuring a successful auction and the preservation of a vibrant and diverse broadcast service.

Today, as this Subcommittee continues its examination of how the public interest can best be served through satellite carriage of local, over-the-air broadcast television signals as provided for by the Satellite Television Extension and Localism Act of 2010 (STELA), I would like to focus on two key principles. First, broadcast localism is a unique and essential component of our communications ecosystem. Second, the market-based relationship that exists between local broadcast stations and pay television providers continues to both function as Congress intended and serve the public interest. As a result, any reauthorization of expiring provisions of STELA should be factually based and narrowly tailored.

Broadcast localism is a unique and essential component of our communications ecosystem

Schurz Communications is proud to own and operate the following local broadcast television stations: KTUU (NBC) in Anchorage, Alaska; KY3 (NBC) and KCZ (The CW) in Springfield, Missouri; WDBJ (CBS) in Roanoke, Virginia; WSBT (CBS) in South Bend Indiana; WAGT (NBC) in Augusta, Georgia; and KWCH (CBS) and KSCW (The CW) in Wichita, Kansas. We also have operating agreements with KSPR (ABC) in Springfield, Missouri and KDCU (Entravision) in Wichita, Kansas. Across the nation, local broadcasters like Schurz inform, foster and connect communities.

Americans know they can turn to their local broadcasters first for live, in-depth, local information. While I could recount numerous examples of our stations excelling at informing local communities of local news, public affairs, severe weather and emergency alerts, I would like to take this time to recognize the tremendous work that

broadcast stations have performed in their coverage of the recent tornados in Oklahoma. Before, during, and after the tragic tornado in Moore touched down on May 20, local broadcast television stations served Oklahomans with up-to-the-minute, life-saving information.[1] Whether it was warning viewers to seek shelter with Doppler radar technology, providing aerial footage of the storm and its destruction from a helicopter or helping emergency personnel communicate rescue and recovery information to residents, broadcasters were there in Moore, Oklahoma as first informers. At 5:30 pm local time, shortly after the worst of the storm, over 475,000 television viewers in the Oklahoma City market were watching local news coverage on broadcast television. To put that in perspective, 375,000 viewers from this market watched the last Super Bowl.

When it comes to disseminating emergency information to the public during times of both natural and man-made disasters, broadcasters remain our nation's most reliable communications network. When phone calls will not go through because either the cell network is congested or phone lines and towers are down, or cable and the Internet go dark from loss of power, anyone with a receiver and battery backup can receive free, over-the-air broadcast signals. As the case of Moore, Oklahoma makes clear, local television broadcasting, because of its boots-on-the-ground reporting and spectrally efficient, one-to-everyone transmission architecture, remains indispensable as a lifeline service in times of danger.

Finally, local television broadcasters also serve an important function in connecting local economies. Through the use of advertising airtime on local television stations,

[1] During the week of May 20-26, which saw a tornado strike the area on May 20, 99 of the top 100 rated programs were found on broadcast television. The top 20 shows for the week were all storm-related coverage, in particular special news coverage of tornado and its aftermath. http://www.tvb.org/measurement/PRR_Week35

local businesses are able to educate and connect with the public about their goods and services on both a geographically-targeted and wide-audience basis. This fundamentally local business model promotes both local jobs and local economic growth.

The market-based relationship that exists between local broadcast stations and pay television providers both continues to function as Congress intended and serves the public interest

Recognizing the vital importance of local, over-the-air broadcast television to viewers across America, Congress adopted retransmission consent in 1992. Congress sought to implement a market-based system of property rights and private contracts to address "a distortion in the video marketplace."[2] The distortion was the ability of cable operators to retransmit and resell a local broadcast station's signal without its permission. Retransmission consent recognizes in local broadcasters a property interest in their over-the-air signal, permitting them to seek compensation from cable operators and other multichannel video programming distributors (MVPDs) for carriage of their signals.

The fundamental factual, equitable and competition policy considerations before Congress in 1992 remain true and valid today. Congress found that "[b]roadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems."[3] Based on these facts, Congress reasoned that "a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals," and because "cable operators pay for the cable programming services they offer to their customers.... that programming

[2] S. Rep. No. 92, 102 Cong., 1st Sess. 35 (1991).
[3] *Id.*

services on a broadcast channel should not be treated differently."[4] Finally, looking at the presence of competing channels owned by cable operators through a competitive lens, Congress did "not believe that public policy support[ed] a system under which broadcasters in effect subsidize the establishment of their chief competitors."[5]

Today, local broadcast signals remain the most watched signals on cable systems. During the 2011-2012 television season, 96 of the top 100 most watched prime time programs were aired by broadcast stations.

In recent years, some pay television providers have come before this Subcommittee and the FCC seeking either wholesale revisions of the retransmission consent framework or more targeted "solutions." The reality is the retransmission consent system, under which local broadcast stations negotiate with pay television providers for the retransmission of their signal, is working just as Congress intended.

Both local broadcasters and pay television providers have an incentive to complete retransmission negotiations in the marketplace before any disruption to the viewer occurs, and thus almost all negotiations are completed on time. NAB studies show that over a recent five-year period, service interruptions from retransmission consent impasses represented approximately one one-hundredth of one percent of annual U.S. television viewing hours.[6] In fact, consumers are more than 20 times more likely to lose access to television programming due to a power outage than a retransmission

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[4] *Id.*
[5] *Id.*
[6] *See* Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 30 (May 27, 2011), attached to NAB Comments in MB Docket No 10-71 (filed May 27, 2011).

negotiation impasse.[7] Moreover, broadcasters have never been found by the FCC to be in violation of their obligation to negotiate in good faith.

Nevertheless, opponents of retransmission consent cite rising retail cable and satellite bills as justification to "reform" retransmission consent. In reality, MVPDs are seeking to limit one of their operating costs, in this case, broadcast programming, and asking for Congress's help. NAB has demonstrated across numerous economic studies that retransmission consent payments are not responsible for high and rising consumer prices charged by MVPDs.[8] Additionally, a recent independent analysis reveals a stark contrast in the weight of costs of cable programming: it estimated that while only two cents of every dollar of cable video revenue goes to retransmission consent, nearly 20 cents goes to cable programming fees.[9] This disparity exists despite the fact that broadcast programming remains the most compelling, most watched programming available.

The fact that new competitors in the MVPD space have emerged in recent years does not weaken the justification for retransmission consent. Certainly both the marketplace and much of the underlying technology have undergone changes over the past two decades. However, the variety of MVPDs in a marketplace does not necessarily mean that the MVPD marketplace is more competitive. Rather, MVPD

[7] *Id.*

[8] *Id.* at 11-24 ("data simply do not support the claim that increases in MVPD prices are caused" by retransmission consent fees, as these fees represent a tiny fraction of MVPD costs); Eisenach & Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (April 2010), Appendix A to the Opposition of the Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010) at 13-17, 21-22 (demonstrating that even a "flawed analysis" conducted for MVPD interests "shows little effect of retransmission consent fees on consumers," and that retransmission fees make up a small fraction of MVPD programming costs and an even smaller percentage of MVPD revenues).

[9] *Where Your Cable Dollar Goes*, Multichannel News (Mar. 28, 2011) at 10-11.

concentration and market power is *increasing* in local markets. Accordingly, these changes in the marketplace do not erode Congress's original rationale that broadcasters should be compensated for their signal as a matter of fairness and sound competition policy, but rather speaks to the wisdom of the property-based framework that it established in the first place. Retransmission consent merely vests in local broadcasters the right to negotiate for the retransmission of their signal—it does not guarantee carriage on an operator's system nor does it dictate the terms or outcome of that negotiation.

Any reauthorization of expiring provisions of STELA should be factually based and narrowly tailored

As this Subcommittee heard in its February hearing, several provisions of STELA are set to expire at the end of 2014, including the Section 119 satellite distant-signal compulsory license of the Copyright Act, and its companion distant-signal retransmission consent exception in the Communications Act. Because of the prevalence of the Section 122 local-into-local compulsory license and its efficacy in promoting local programming in local markets, this Subcommittee should take a hard look at the factual necessity of retaining the distant signal compulsory license for satellite providers. While it remains a factual question as to how many satellite subscribers rely on Section 119 to receive broadcast programming today, during the consideration of STELA it was estimated that only two percent of satellite subscribers received a distant-signal package, and that number was declining in 2009.

Only when every satellite subscriber receives local broadcast stations, and not out-of-market alternatives, are the public interest benefits of the local broadcast system truly

realized. Thus, without this factual basis, it is difficult to justify the continuation of the policy of Section 119, "to allow for a life-line network of television service to those homes beyond the reach of their local television stations,"[10] given that the Section 122 local-into-local license has both improved satellite's competitiveness with cable providers and enhanced broadcast localism. In fact, DISH now provides local-into-local service into all 210 Designated Market Areas (DMAs), and DIRECTV in all but 14 DMAs.

Despite the harm it poses to localism, there have been recent calls from the MVPD community to increase the instances in which the importation of a distant signal is permitted. DISH, for example, has proposed that during a retransmission consent impasse, "video distributors should be able to temporarily provide another market's network signal."[11] DISH suggests that Congress should enact this "reform" as part of its examination and potential reauthorization of STELA.[12]

This proposal, and those like it, would unabashedly tilt the marketplace in pay television providers' favor during retransmission consent negotiations, undermine the equitable and competition policy goals of the statute and ultimately harm consumers. Permitting the importation of a distant signal would vitiate the privately negotiated contracts between local broadcast stations and program distributors for the distribution of network and syndicated programming on an exclusive basis. In turn, this would undercut broadcasters' ability to invest in high quality informational and entertainment

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[10] SHVIA Conference Report, 145 Cong. Rec. at H11792-793.
[11] Testimony of R. Stanton Dodge, DISH, before Senate Commerce Committee (May 14, 2013).
[12] *Id.*

programming, to serve viewers, and to compete effectively for audiences and advertisers.

Ironically, the importation of distant signals, although touted as a consumer-oriented remedy to potential retransmission consent impasses, would most likely create a greater number of such impasses with longer durations by removing a key incentive for MVPDs to reach deals. This would harm local viewers of broadcast television who subscribe to MVPDs who, during this period of impasse, would still be without local news, public affairs, severe weather and emergency alerts, as well as over-the-air viewers who benefit from the investment and scale of local television stations.

Similarly, some have argued against stations' utilization of joint sales agreements (JSAs), local sales agreements (LSAs) and shared service agreements (SSAs) as it relates to retransmission consent and localism. What I can tell you from personal experience is that such sharing arrangements benefit the public, particularly in small and medium markets, through improved news-gathering capabilities, increased local news, sports and other programming and enhanced transmission facilities. To purchase expensive equipment, such as helicopters and Doppler radars, or to offer more robust local news, these sharing agreements have been very helpful.

Schurz has SSA-JSA-LSA success stories. Our General Manager at KWCH in Wichita, Kansas, heard that the Spanish language broadcaster, Entravision, was considering entering the Wichita market. We approached Entravision about a sharing arrangement that enabled KDCU, the Entravision station, to get on the air faster. Within one year, KWCH worked with KDCU to launch a local newscast in Spanish—the first, and still the only one, in Kansas. Entravision is on record saying they

may not have been able to provide these services on their own given the economics in smaller markets.

Additionally, in 2006 Schurz entered into a SSA-JSA with local businessman Bill Perkin, the owner of KSPR in Springfield, Missouri. When Mr. Perkin bought the station, KSPR had been an historical under-performer. Many day-parts were barely registering in the television ratings and a succession of short-term owners had under-capitalized the station to the point that its digital coverage consisted of a 40 watt transmitter – that's less than the power of a light bulb. Together Mr. Perkin and Schurz invested in a new facility for KSPR, making it the first full HD local news product in the market. Back-end services are shared, but the station has its own stand-alone news department. While some news product, such as sports highlights, news conferences, etc. is shared, the Perkin and Schurz entities compete robustly and aggressively in the Springfield market. Today, KSPR's news product is second in the market and the winner of numerous awards for journalism and community service.

Importantly, I want to note that Schurz will jointly negotiate retransmission consent agreements on behalf of the shared entity ***only* if the cable or satellite operator agrees to negotiate jointly**. That is a decision made solely by the operator. The reality is that these sharing agreements often simplify complex negotiations for both parties,[13] enhance localism and benefit viewers.

[13]For example, Time Warner Cable, the nation's second largest cable operator, routinely negotiates retransmission consent deals on behalf of itself and Bright House Networks, another sizable cable system operator. Mike Reynolds, *TWC Reach Retrans Agreement in Principle*, Multichannel News (Jan. 1, 2013). Similarly, the American Cable Association provides its members with boilerplate retransmission consent agreements to use in negotiations with local stations. *See* http://www.americancable.org/files/images/ACA-RTC_Sample_Agreement_111005.doc (last visited June 10, 2013).

Conclusion

Undermining broadcasters' retransmission consent negotiation rights would reduce the quality and diversity of broadcast programming, including local news, public affairs, severe weather, and emergency alerts, available both via MVPDs and free, over-the-air to all Americans. The current system of retransmission consent is working, and I urge this Subcommittee to resist calls to change it for the benefit of particular industries as part of its examination of STELA reauthorization. Instead, any reauthorization of STELA, in particular Section 119 distant signal license, should be factually based and narrowly tailored.

Thank you for inviting me to participate in this important hearing today.

Mr. WALDEN. Ms. Burdick, thank you very much for your testimony. We appreciate your comments.

We will now turn to the President for Global Distribution of the Disney Media Networks, Mr. Ben Pyne. We are delighted to have you here, sir, and please go ahead.

STATEMENT OF BEN PYNE

Mr. PYNE. Thank you, Chairman Walden and Ranking Member Eshoo, and other members of this subcommittee——

Mr. WALDEN. I am not sure your microphone is on, maybe. There you go.

Mr. PYNE. Thank you, Chairman Walden, Ranking Member Eshoo, and other members of this subcommittee. I had the opportunity to appear before you 6 years ago at a hearing entitled "The Future of Video." At that hearing, I promised we, the Walt Disney Company, will continue to find ways to get our content to any screen consumers use: computers, PDAs, mobile phones, iPods, and of course, TV sets. You may have noticed that I did not use the word iPad in 2007. Of course, it was introduced 3 years after that hearing.

What I am proud to tell you today is that we continue our commitment to developing and using new technology to improve the consumer experience. In cooperation with MVPDs, that is cable, satellite and telco distributors, we now make live streaming of many of our channels available to subscribers under tablets and smartphones. ESPN's Watch ESPN app, downloaded more than 18 million times, was the first application to provide live streaming of a cable channel. Likewise, our line of Watch Disney apps, downloaded now 15 million times since last year, offers the same convenience to subscribers of Disney Channel, Disney XD, and Disney Junior. In fact, just last month we were the first broadcaster to launch a streaming service. Our Watch ABC service allows users to watch their local ABC stations online and on smart devices in their hometowns. We hope the service will soon be available in markets across the country.

In addition to our Watch services, Disney has recognized the value of using online video distributors to reach consumers who want to enjoy our content in many other ways. We are a part owner of Hulu, and we have negotiated agreements to distribute our content on a host of other online platforms, including Netflix, Amazon, Streampix, and even X-Box.

While all of these new forms of distribution are critical to our future, we continue to place a very high value on distributing content through MVPDs. We believe that monthly video subscriptions purchased by the overwhelming majority of American households continue to be of a tremendous value. We remain committed to delivering outstanding programming to these viewers at all times. As evidence of that, in the last few years we have reached long-term deals with many of the largest MVPDs.

The common thread that runs through our use of all these technologies, old and new, is that each allows us to provide additional value to consumers and customers, while achieving a return on our investment in quality programming. Quality content is expensive to produce. Last year, we spent approximately $3 billion producing

programming for ABC and our own stations. As a policy matter, given the significant risk and expense inherent in producing great content, it is critical that we continue to be permitted to negotiate freely for compensation of the distribution of our content.

In this context, we believe the current regime requiring MVPDs to negotiate for the right to carry a broadcast signal, the process known as retransmission consent, is working well. Ultimately, this is a process that ensures that MVPDs compensate broadcasters for the value inherent in the carriage of that signal. Thousands of privately negotiated agreements for retransmission consent have been reached with few interruptions of service.

The model of compensating local broadcasters for carriage is working for American consumers. The lion's share of the most watched programs on television are consistently found on broadcast TV. Local stations are able to provide outstanding local news and coverage for emergency events. With the launch of our Watch ABC services, we will be working with our broadcast affiliates to offer even more value for MVPDs to make available to their customers.

I recognize that this committee has heard pleas for changes to retransmission consent. We believe the current system provides the appropriate incentives to reach agreements. We want our local and network programming carried by MVPDs. They want to carry our programming because their customers want to watch it. These mutual incentives encourage the successful resolution of negotiations. Additional government action is not necessary.

Finally, I would like to turn to satellite legislation. The original law adopted by Congress 25 years ago eased the way for the technology available at that time to be used to distribute distant network programming to many households, especially in rural areas, that would otherwise not be able to receive the network programming at all. To their great credit, the satellite companies have made significant investments in their technology and today, they are able to deliver local broadcast stations to more households than ever. As a result, the necessity of the satellite legislation to ensure the availability of network programming is simply not as great as it once was. In fact, we believe Congress could give serious consideration to letting the legislation sunset. We realize, however, that you may be concerned by uncertainty regarding what would happen to rural viewers if the legislation was not reauthorized. In the face of that uncertainty, we understand if you choose to extend it, but would ask that you do so simply by extending the current expiration date.

Thank you very much.

[The prepared statement of Mr. Pyne follows:]

Testimony of Benjamin N. Pyne

President, Global Distribution, Disney Media Networks

June 12, 2013

Thank you, Chairman Walden and other members of the Subcommittee. My name is Ben Pyne, I am President, Global Distribution, Disney Media Networks.

I appreciate the invitation to return to this subcommittee. I had the opportunity to appear before you six years ago at a hearing entitled the "Future of Video." With the rapid rate of change in the digital age, six years can seem like eons. Indeed the last six years has brought many exciting new breakthroughs that benefit consumers of video.

Despite these changes, the principles underlying Disney's approach to new technology – which I espoused at that hearing in 2007 – remain the same today. At that hearing, I said: "At Disney, we believe the greatest danger to our future business would be to cling to a model based on scared 'old' thinking. We recognize that technology has empowered the consumer more than ever before, and we use technology to deliver quality content in the most convenient and timely way possible, to every screen within reach and at a price that makes it a genuine value."

At that hearing, I talked about the efforts we were making to reach our viewers in ways that were new at the time, but may seem old hat by now: iTunes downloads, streaming on ABC.com, and video on demand, etc. I promised "we will continue to find ways to get our content to any screen consumers use: computers, PDAs, mobile phones, iPods, and of course, television." You may have noticed that I did not use the word iPad in 2007. It was introduced three years after that hearing.

Well, I am proud to tell you today that we continue our commitment to developing and using new technology to improve the consumer experience. In cooperation with our MVPDs – for example,

cable, satellite, and telco distributors – we now make live streaming of many of our channels available to subscribers on their tablets and smart phones. ESPN's award-winning WatchESPN app was the first smart phone application to provide live-streaming of a cable channel to viewers. WatchESPN has been downloaded more than 18 million times. Likewise, our line of WatchDisney apps – downloaded 15 million times - offers the same convenience to subscribers of the Disney Channel, Disney Junior, and Disney XD. We will soon be launching our Watch technology internationally – beginning in Singapore.

Just last month, in keeping with Disney's tradition of being a pioneer in the delivery of video to consumers, we were the first broadcaster to launch a streaming service in New York and Philadelphia. Our WatchABC service allows users to watch their local ABC stations online, on smart phones, and on tablets in their home towns. We will offer these services employing the same business model that underlies our other Watch services. The industry calls this "TV Everywhere." We plan to rollout our Watch ABC service in our other home town markets over the summer. And one of our affiliated station groups , Hearst, already has plans to launch the Watch ABC service in their home town markets as well. We hope the service will soon be available in home town markets across the country and that all of our MVPDs will join with us and our broadcast affiliates to enable that to happen.

In addition to our Watch services, Disney has recognized the value of using online distributors to reach consumers who want to enjoy our content. We are a part owner of Hulu, a service that allows viewers to watch content online, including current and past ABC television shows. We also have negotiated agreements to distribute our content on a host of other online platforms, including Netflix, Amazon, Streampix, and even X-box.

While all of these new forms of distribution are critical to our future, we continue to place a very high value on distributing content through our MVPDs. We believe that monthly video subscriptions purchased by the overwhelming majority of American households continue to be a tremendous value.

We remain committed to delivering outstanding programming to these viewers. As evidence of that, in the last few years, we have reached long-term deals with many of the largest MVPDs.

The common thread that runs through our use of all of these technologies – old and new - is that each allows us to provide additional value to consumers, and in turn, each allows us to achieve a return on our investment in quality programming that enables further program development. As creators of content, we take significant risk by investing in a product for which there is no guarantee of success. Quality content is expensive to produce. Last year, we spent approximately $3 billion producing programming for ABC and our owned stations. As a policy matter, given the significant risk and expense inherent in producing great content, it is critical that we continue to be permitted to freely negotiate for compensation for the distribution of our content.

In this context, we believe the current regime requiring MVPDs to negotiate for the right to carry a broadcast signal – the process known as retransmission consent – is working well. Ultimately, this is a process that ensures that MVPDs compensate broadcasters for the value inherent in the carriage of that signal. Over the years thousands of privately negotiated agreements for retransmission consent have been reached with extremely few interruptions of service.

The model of compensating local broadcasters for carriage on MVPDs is working for American consumers. The lion's share of the most watched programs on television are consistently found on broadcast television. Local stations are also able to provide outstanding local news and coverage of emergency events. In the past year alone, WABC in New York and WPVI in Philadelphia provided 24/7 coverage of Hurricane Sandy. Our ABC affiliates covering tornadoes in Oklahoma and other natural disasters in other areas of the country have similarly provided emergency coverage when it was most needed.

Our local stations and our ABC affiliates offer MVPD s compelling content that is highly viewed and sought after by their MVPD customers. With the launch of our Watch ABC services, we will be working with our broadcast affiliates to offer even more value for MVPDs to make available to their customers. We are working collaboratively with our affiliates and MVPD s to bring Watch ABC to all Americans as quickly as possible.

I recognize that this committee has heard pleas for changes to retransmission consent. We believe the current system provides the appropriate incentives to reach agreements. We want our network programming carried by our cable, satellite, and telco distributors. They want to carry our programming because their customers see value in paying for it – and because these same customers often purchase additional services like broadband. These mutual incentives encourage the successful resolution of negotiations in almost all cases without interruption.

Finally, I would like to turn to the satellite legislation that this Committee has begun to examine. Satellite television is an important means by which we are able to reach our viewers. The original satellite legislation adopted by Congress was important, because it eased the way for the technology available at that time to be used to distribute distant network programming to many households – especially in rural areas – that would otherwise not be able to receive network programming at all.

To their credit, the satellite companies have made significant investments in their technology and today, they are able to deliver local broadcast stations to more local households than ever. As a result, the necessity of the satellite legislation to ensure the availability of network programming in rural areas is simply not as great as it once was. In fact, we believe the Congress could give serious consideration to letting the satellite legislation sunset.

We realize, however, that you may be concerned by uncertainty regarding what would happen to rural viewers if the legislation was not reauthorized. In the face of that uncertainty, we understand if you choose to extend it, but would ask you to do so by simply extending the current expiration date.

Every five years there are some who want to use any effort to renew the existing satellite legislation to tack on provisions that are unrelated to satellite television. Someone will present an idea about how to make that government mandate just a little bit broader in scope. We urge you to resist those efforts.

This time, you will hear from parties who want you to change the retransmission consent process as well. We urge you not to do so. Any changes would be irrelevant to the underlying legislation and unnecessary in today's vibrant marketplace. If you ultimately conclude that the legislation must be renewed, we ask you to do so by simply extending the current date.

Thank you.

Mr. WALDEN. Thank you, Mr. Pyne. We appreciate your testimony.

I would now turn to Amy Tykeson, who is the CEO of BendBroadband. We appreciate your being here, as I said earlier, and welcome your comments.

STATEMENT OF AMY TYKESON

Ms. TYKESON. Thank you. Good morning, Chairman Walden and Congresswoman Eshoo, and members of the subcommittee. I am Amy Tykeson, President and CEO of BendBroadband, a family-owned independent cable operator that serves about 50,000 residential and commercial customers in Central Oregon. Thank you for inviting me here to testify this morning.

My goal is to highlight the challenges facing cable operators, particularly smaller operators like BendBroadband. It is time for Congress to update the law to meet consumers' needs and interests.

Let me tell you a little bit more about my company. Our tag line says it all: "We are the local dog. We better be good." We have invested about $100 million to upgrade our network and bring people in Bend the best services available. We employ 270 associates, and we are the 14th largest employer in Central Oregon. We are a first mover, and we are recognized as an industry leader.

I want to discuss three examples of how the outdated video rules are hurting my customers and should be addressed in STELA.

First, I can't create the programming packages my customers want; second, the retransmission consent process is broken; and third, technology mandates for set top boxes should be repealed.

First, let me tell you why I can't give my customers the packages they want. The major programmers each control a dozen or more channels. When I negotiate with them, they tell me I have to take all of those channels and that I have to package them the way the programmers want, not the way my customers want. These bundling arrangements are resulting in significant fee increases for my customers. Program bundling is particularly harmful to smaller operators like BendBroadband, who are often presented with a take it or leave it offer.

Second, my customers are being hurt by the broken retransmission consent process. I have been through a retransmission consent blackout, and my customers don't want it to happen again. But I fear it will, unless the rules are updated. For example, Congress intended for retransmission consent to support local stations, not to subsidize the operations of big national broadcast networks. But the networks are demanding an increasing share of their affiliates' retransmission consent fees. This harms localism by diverting revenues from the local stations. It also drives up the cost of retransmission consent and makes the negotiations more contentious. For the MVPDs, the cost of retransmission consent has grown from about $216 million to nearly $2.4 billion in just 6 years, and fees are estimated to top $6 billion by 2018. In my market alone, retransmission consent demands have nearly tripled over the last 3-year negotiating cycle.

My final example concerns Section 629 of the Communications Act. That rule resulted in technology mandates for set top boxes that have cost the industry more than $1 billion and have not ben-

efitted customers. Today, consumers watch programming on a plethora of devices, some of which we have talked about this morning. This rule should be repealed.

These three examples illustrate how a regulated marketplace can be detrimental to consumers when government does not routinely review and update applicable laws. The time has come for a comprehensive review of the existing video framework. At a minimum, I would urge Congress to amend STELA to address issues like the ones I have identified today, to yield more choice, lower prices, and a healthy marketplace to benefit consumers.

Finally, I want to acknowledge Representative Scalise and other members of this subcommittee who have advanced the debate on video reform. I look forward to working with you to examine these important issues and welcome your questions. Thank you.

[The prepared statement of Ms. Tykeson follows:]

TESTIMONY OF AMY TYKESON
PRESIDENT & CHIEF EXECUTIVE OFFICER
BENDBROADBAND

THE SATELLITE TELEVISION LAW: REPEAL, REAUTHORIZE OR REVISE?

before the

SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
COMMITTEE ON ENERGY AND COMMERCE

UNITED STATES HOUSE OF REPRESENTATIVES

WASHINGTON, DC

JUNE 12, 2013

Good morning Mr. Chairman, Ranking Member Eshoo, and Members of the Subcommittee. My name is Amy Tykeson, and I am President and CEO of BendBroadband. I appreciate the opportunity to appear before you today to consider the reauthorization of the Satellite Television Extension and Localism Act of 2010 ("STELA").

In my testimony, I want to bring to your attention some of the challenges that confront cable operators – particularly smaller operators – in today's video marketplace. The competition that cable operators face from satellite companies with national footprints, from well-funded telco-video providers with established customer bases, and, increasingly, from a host of new Internet-based sources of video programming, is formidable.

But the challenges I want to discuss today are those that cable operators face as they attempt to navigate a path through a marketplace where outdated, unnecessary and often one-sided rules are combined with an increasingly consolidated programming marketplace. This combination of factors is preventing cable operators from giving consumers the video service that they want, at reasonable prices, using the most innovative technologies available.

My testimony today will focus on three examples of how today's video marketplace would benefit from targeted reforms. These three examples are:

1. **The barriers to creating programming packages that respond to consumers' needs and demands;**

2. **The breakdown of the retransmission consent process, which is harming consumers; and**

3. **The unnecessary costs imposed on cable consumers by requiring separable security in set-top boxes.**

BendBroadband: From Community Antenna Service to Provider of Advanced Communications Services.

Let me begin by discussing my experience at BendBroadband, which is a second generation, family-owned business serving the tri-county area of Central Oregon. Our origins trace back more than 50 years to a small community antenna television facility constructed for the purpose of bringing broadcast television signals to viewers in Bend, Oregon. Today BendBroadband is a nationally-recognized independent business that was the first "traditional" cable system in the country to transition to 100 percent all-digital service.

Our system, which has more than 2,000 miles of fiber and coax infrastructure, delivers advanced video, voice and Internet services to approximately 50,000 commercial and residential subscribers in Central Oregon, a region with about 180,000 people. We also operate a Tier III, LEED Gold, colocation data center that serves the regional medical community and is a catalyst for economic development. At BendBroadband, we are proud of our reputation as

a progressive employer and engaged corporate citizen in the local communities we serve. We are the 14th largest employer in the region, with 270 associates.

Our company's evolution from a basic community antenna service to a provider of advanced communications services mirrors the evolution of the cable industry as a whole. When many of today's cable regulations were put into place, traditional cable systems were labeled "monopolies." Today, the nation's cable systems are vying on a daily basis with a host of competitors to attract and retain digital video, voice, and data customers.

The emergence of a robustly competitive communications marketplace and the rapid advancement of technology over the past two decades go hand-in-hand. Advances in technology have enabled competition and competition has spurred advances in technology. The cable industry and BendBroadband have been at the vanguard of this virtuous cycle. The cable industry has invested billions of dollars to upgrade facilities and develop and deploy new services including high-speed broadband, digital video and voice products.

These investments, which ultimately benefit consumers, are not limited to the larger cable operators; BendBroadband has invested $100 million dollars over the past seven years in order to provide our customers with the most advanced and diverse array of services possible.

The Cable Market Has Evolved, But the Laws Governing Cable Have Not.

The cable industry clearly has been moving forward. But the laws and regulations governing the industry have not. A snapshot of the cable market taken in 1992 would have shown a market in which traditional cable systems had a 98 percent market share.[1] But a snapshot of the cable market today shows a much different picture.

Today, virtually every consumer has at least two and sometimes three alternatives to the incumbent cable operator (*i.e.*, the two national satellite providers and, often, a telco-video provider like Verizon FiOS or AT&T U-Verse). As a result, cable's share of the multichannel market has dropped from 98 percent to 56 percent.[2]

In addition, cable operators no longer are the dominant players in the video programming universe. Cable operator ownership of non-broadcast cable networks has declined from more than 50 percent in 1992 to only 14 percent today.[3] At the same time, the "Big Four" broadcast networks have consolidated ownership of cable programming channels and now control at least 60 percent of the non-broadcast cable programming channels.

[1] *See* Hearing on the State of Video, Subcommittee on Communications, Technology, and the Internet of the Committee on Commerce, Science and Transportation (May 14, 2013) (Testimony of Michael K. Powell, President and CEO, National Cable & Telecommunications Ass'n. ("*Powell Testimony*").

[2] *Id.*

[3] *Id.*

With this background in mind, I want to discuss three examples of areas ripe for reform as Congress considers the reauthorization of STELA.

1. The Barriers to Creating Programming Packages That Respond to Consumers' Needs and Demands.

As noted above, a handful of large programmers, including the Big Four national broadcast networks, have become the dominant providers of video programming. One of the ways that these programmers have achieved their positions of dominance is by engaging in a series of practices that are sharply driving up the cost of programming and adversely impacting consumer choice.

In particular, the major program suppliers each control a dozen or more channels. However, only a few of these channels contain "must have" programming. The rest either are far less valuable to customers (and thus would have difficulty achieving widespread distribution on their own) or they are expensive, niche channels. In the past, cable operators sought to keep the price of basic cable service affordable by providing optional tiers and expanded levels of service.

But programmers, drawing on the market power that they derive from their must have channels, are requiring cable operators to carry all of their channels on broadly available tiers. These practices are costing operators, and ultimately consumers, billions of dollars in increased programming expenses.

Our customers are signaling to us by word and action that they want more choice in the programming they purchase both in terms of the channels offered and the prices charged. Unfortunately, our ability to create such packages is limited by programming contracts. As a result, multichannel video programming distributors (MVPDs) have little control over the input costs of our video offerings or the make-up of the packages that we offer to consumers. In addition, independent programmers are often losing out under this system.

While the major programmers' bundling and tiering practices are a growing problem for all MVPDs and their customers, they present unique difficulties for smaller operators. Because some of our communities have been hit especially hard in the recession, smaller, less expensive packages of programming would be a welcome option for consumers. But small operators lack leverage and are largely presented with take it or leave it offers with little or no room for negotiation.

Smaller operators (and operators with a small footprint in a local market) also can face discrimination in the prices and terms they are offered compared to the prices and terms offered to larger companies. Programmers charge higher prices and offer less attractive terms to cable operators with fewer customers despite the absence of quantifiable cost differences to justify these price

differences. As a result, the impact of rising programming fees is felt more acutely by small cable operators, a finding recently affirmed by industry analysts.[4]

Congress sought to protect smaller operators from discriminatory and unfair programming practices by extending "program access" protections to programming buying groups. However, the regulations adopted by the FCC in 1993, particularly the definition of a "buying group," prevent the nation's largest programming buying group, the National Cable Television Cooperative ("NCTC") from availing itself of the law's protections as Congress intended. The FCC is now considering and should adopt updated rules that would allow a buying group, like the NCTC, to file program access complaints and would also create safeguards to prevent programmers from evading the rules. It is vital that the FCC act now to update the rules applicable to buying groups by making it clear that programmers must treat buying groups comparably to other MVPDs and prohibit the arbitrary exclusion of certain buying group members from joining a master agreement.

Cable operators and other distributors should be able to offer consumers choice and flexibility that 21st Century technology enables. And, we welcome a dialog on these issues.

[4] Moody's, Smaller US Cable Operators to Feel the Brunt of Rising Programming Costs, May 2, 2013 *available at* http://www.moodys.com/research/Moodys-Smaller-US-Cable-Operators-to-Feel-the-Brunt-of--PR_272253.

2. The Breakdown of the Retransmission Consent Process, Which is Harming Consumers.

There is no small irony in the fact that the major broadcast networks are among the largest purveyors of non-broadcast cable channels today. In 1992, more than half of such channels were controlled by cable operators and Congress was concerned that those cable operators had the incentive and ability to threaten the future of local over-the-air broadcasting. Congress' answer was to create a new "retransmission consent" right that was supposed to ensure the "universal availability" of local broadcasting without harming consumers who subscribe to MVPD service.

Today, the retransmission consent process is benefiting the national broadcast networks far more than localism or the viewing public. This is because local stations' retransmission consent rights have been usurped by the major national broadcast networks who demand a share of their affiliates' retransmission consent revenues as "reverse compensation."[5] The resulting diversion of retransmission consent revenues from local stations to national broadcast networks does not help preserve localism as Congress intended. Rather, it provides a subsidy for the national broadcast networks' operations. It also subsidizes the

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[5] For example, in May 2011 it was reported that NBC had entered into an arrangement with its affiliates under which NBC would hold its affiliates' proxies and negotiate retransmission consent deals on their behalf, with NBC pocketing as much as 50 percent of the revenues. *See* Harry A. Jessell, *NBC's Affiliate Retrans Plan is 50-50 Split*, TVNewsCheck, May 18, 2011 *available at* http://www.tvnewscheck.com/article/2011/05/18/51322/nbcs-affiliate-retrans-plan-is-5050-split.

national networks' cable channels – channels that siphon off programming and viewers from local over-the-air affiliates.[6] This puts even more pressure on the local affiliates to increase the retransmission consent fees that they demand from cable operators and other MVPDs.

As a result, retransmission consent negotiations are becoming more contentious and demands for retransmission consent fee hikes are spiraling upward at a dizzying pace. In 1992, Congress expected that the rough balance of power that then existed between local stations and cable operators would prevent either side from taking advantage of the other.[7] But the market has changed dramatically and local stations have been able to leverage their monopoly position (protected by government-guaranteed territorial exclusivity arrangements) to play competing MVPDs against each other. According to SNL Kagan, retransmission consent payments, which were all but non-existent in the 1990s, grew from $215 million in 2006 to nearly 2.4 billion in 2012 and are expected to top $3 billion this year.[8] By

[6] For example, after 50 years on CBS broadcast stations, next year the US Open Tennis Tournament will be moved to ESPN (which is vertically integrated with the ABC broadcast network). Such moves are made possible by the national networks using retransmission consent revenues.

[7] *See* S. Rep. No. 102-92 (1991) ("Senate Report") at 1168 (expressing expectation that demands for retransmission consent compensation would be modest because "broadcasters also benefit from being carried on cable systems"). *See also* 138 Cong. Rec. S643 (Jan. 30, 1992) (Statement of Sen. Inouye) ("It is of course in the mutual interests of these parties to reach an agreement: the broadcaster will want access to the audience served by the cable system, and the cable operator will want the attractive programming that is carried on the broadcast signal."); Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues, Report and Order, 8 FCC Rcd 2965 (1993) at para. 115 (finding that "there are incentives for both parties to come to mutually beneficial arrangements" in retransmission consent negotiations").

[8] SNL Kagan, Economics of Broadcast TV Retransmission Revenue, May 15, 2013.

2018, retransmission consent fees are projected to double again, to more than $6 billion.[9] In short, obtaining access to "free" local television is becoming increasingly expensive for the tens of millions of homes that subscribe to cable or another MVPD.

This is not what Congress intended. Retransmission consent was never meant to be a subsidy for the national networks. In fact, during the debate over the 1992 Act, Members of Congress repeatedly stated that local stations, not the national networks were the intended beneficiaries of the new retransmission consent right.[10] Yet, despite those statements, and despite assurances by the broadcast industry that the national networks would play no role in retransmission consent,[11] today those networks take the position that they should be the ones benefitting from the retransmission consent rights granted by Congress to local

[9] *Id.*

[10] As Senator Inouye stated, Congress intended for retransmission consent to "permit local stations, not national networks...to control the use of their signals." 138 Cong. Rec. S562-63 (Jan. 29, 1992). Other members of Congress echoed Senator Inouye's statement. *See, e.g.*, 138 Cong. Rec. H6491 (July 23, 1992) (Statement of Rep. Callahan) ("The right to retransmission consent ...is a local right. This is not, as some allege, a network bailout for Dan Rather or Jay Leno. Networks are not a party to these negotiations, except in those few instances where they own local stations themselves.") (emphasis supplied); 138 Cong. Rec. H6493 (statement of Rep. Chandler) ("The intent of the [retransmission consent] amendment was to give bargaining power to local broadcasters when negotiating the terms of cable carriage – not to serve as a subsidy for major networks.") (emphasis supplied).

[11] *See, e.g.*, Letter from Edward O. Fritts, President & CEO, NAB, to Jack Valenti, President, MPAA, dated October 7, 1991 ("NAB Oct. 7, 1991 Letter") (stating that retransmission consent was "not a 'network TV' issue, that the networks would not play a role in the negotiations between local stations and local cable systems, and that the networks would have "no right to dictate their terms or to demand any part of the benefits which the local station might obtain from a cable system"). S*ee also* Letter from Edward O. Fritts, President & CEO, NAB, to Rep. Christopher H. Smith, dated August 9, 1991 (stating, in attachment, that characterizations of retransmission consent as a "network plan" are "sheer nonsense" and that "Networks are not involved in any negotiations."). Copies of the documents referred to herein can be found as an attachment to the Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc. filed in the FCC's retransmission consent reform proceeding, MB Docket No. 10-71, on May 27, 2011.

network affiliates.[12] And as David Smith, CEO of Sinclair Broadcasting Group, has commented, local broadcasters will have to "keep upping" their retransmission consent demands "forever" in order to satisfy the networks' reverse compensation demands.[13]

The pressure to extract payments not only for themselves but also for the national networks has driven local stations to do whatever they can to take advantage of their already considerable bargaining advantage over MVPDs. For example, local broadcasting is becoming increasingly consolidated through station acquisitions or the use of contractual arrangements that allow local Big Four network affiliated stations to coordinate their retransmission consent negotiations and thereby further increase their leverage.[14] One study has found that the retransmission consent fees for Big Four broadcast network affiliates are more than

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[12] For example, Les Moonves, who is CEO of CBS, has made it clear that in his opinion, what drives retransmission consent prices is network programming not the local news. *See Les Moonves Insists That Retrans Cash Is Network Driven*, Radio & Television Business Report, June 3, 2011, *available at* http://www.rbr.com/tv-cable/les-moonves-insists-that-retrans-cash-is-network-driven.html (emphasis supplied). Mr. Moonves has said that because of the leverage that broadcasters have in retransmission consent negotiations the "sky's the limit" when it comes to the amount that consumers can be forced to pay for local television stations. CableFAX Daily, June 3, 2011, at 2.

[13] Communications Daily, May 5, 2011, at 5.

[14] While data indicating the precise number of instances in which one station has control over the exercise of retransmission consent for multiple stations in a market is hard to come by, a review conducted in 2011 by BIA/Kelsey on behalf of Time Warner Cable indicated that there are more than 40 examples of "virtual duopolies" in which one station uses its multicast capacity to operate as the market affiliate of two Big Four networks and nearly 150 instances in which one station's multicast capacity allows it to serve as an affiliate of both a Big Four network and one of the "Little Two" networks (CW or MyNetwork). *See* Testimony of Melinda Witmer, Executive Vice President & Chief Video and Content Officer, Time Warner Cable, before the Committee on Commerce, Science and Transportation, United States Senate (July 24, 2012), *available at* http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=bd33c7c9-bd4d-43c0-93d5-091e1fd3328b.

20 percent higher when a single station negotiates on behalf of more than one affiliate in a market.[15] Moreover, a common consequence of local station consolidation is a merging of station news gathering and reporting operations, resulting in staff layoffs and a reduction in local programming. In these situations, consumers are actually ending up paying more for less.

Consolidation of stations and collusive retransmission consent negotiations are practices that are widespread and increasing.[16] A survey of small cable operators has identified 48 pairs of separately-owned, same market television stations in 43 television markets that are using a single representative to negotiate retransmission consent.[17] The FCC is currently considering proposals to prohibit this anticompetitive practice in two separate rulemakings.

Pressure to satisfy the demands of the national networks also has driven local stations to make more frequent use of threatened blackouts, and actual blackouts, to force a distributor to capitulate to the stations' retransmission consent demands. The number of retransmission consent-related shutdowns increased

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[15] Letter from Ross J. Lieberman, Vice President of Government Affairs, American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-71 (filed June 3, 2013).

[16] *Id.*

[17] Letter from 25 Smaller Cable Operators to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-71 (filed Feb. 4, 2013). This number does not reflect the even greater number of instances in which cognizable duopolies or multicast "virtual duopolies" result in a single entity controlling retransmission consent decisions for more than one station in a market. *See* note 14 *supra*. *See also* Letter from Barbara Esbin, Counsel to American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-71 (filed Feb. 16, 2011) (indicating that there were at least 93 sharing arrangements in 78 markets).

from 12 in 2010 to 51 in 2011 to 91 in 2012.[18] These blackouts are directly at odds with what was supposed to be the goal of retransmission consent: preserving the universal availability of free over-the-air broadcast programming.

At BendBroadband, we have had one retransmission consent-related blackout in recent years. It was disruptive and frustrating to our customers and is not something I would be eager to repeat. But I am concerned that if the current structure is not modified, we and other companies will continue to face similar circumstances in the future as the only backstop to protect our customers from the doubling and tripling of retransmission consent fees.

3. The Unnecessary Costs Imposed on Cable Consumers for Separated Security in Set-top Boxes.

All aspects of the video marketplace have changed dramatically and the market for navigation devices is no exception.

Seventeen years ago when Section 629 was enacted, Congress believed that consumers had only one option to obtain multichannel video programming at home—by leasing a set-top box from their incumbent cable provider. In response, it directed the FCC to take steps to give consumers a retail alternative to the leased set-top box.

[18] *See, e.g.*, SNL Kagan, Rewarding Blackout Behavior, August 22, 2012; J. Eggerton, ATVA Cites Rise in Retrans Blackouts, Multichannel News, Jan. 2, 2012, *available at* http://www.multichannel.com/distribution/atva-cites-rise-retrans-blackouts/140973.

Today, consumers want to view video programming when and where they want it. The marketplace has responded with a revolution of new alternatives to traditional TV – including Internet connected TVs, streaming to tablets, mobile telephones and other "smart" video devices, as well as numerous new services from traditional cable operators and from new "over the top" and other service providers. For example:

- Consumers can purchase a wide variety of tablets, PCs, and gaming devices, and Smart TVs that can access video services from MVPDs such as Comcast, Time Warner Cable, Verizon and DirecTV – without a set-top box.
- More than 120 million Internet-connected TVs are expected to be sold by 2014, offering video services from MVPDs and over-the-top video providers, including Netflix, Google, Hulu, Roku, Boxee, and game console providers such as Microsoft (Xbox), Nintendo (wii), and Sony (PlayStation).[19]
- Consumers can access multichannel video on their personal computer and other Internet-connected devices using implementations of "TV Everywhere" and set-top boxes are beginning to combine TV with other applications and content.
- Video providers and device manufacturers like TiVo, and designers of gaming stations like Microsoft Xbox are working together on unique programming distribution agreements, combining the retail device and MVPD service experience.

Yet, in a spite of these marketplace developments, the cable industry has been forced to spend approximately one billion dollars to comply with outdated rules that do not apply to its major competitors.[20] At BendBroadband, we were able to avoid some of these costs by obtaining the first FCC waiver of the ban on integrated set-top boxes. That waiver acknowledged the fact that compliance with

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[19] Internet-connected-TV sales to skyrocket, Los Angeles Times, April 26, 2011, *available at* http://latimesblogs.latimes.com/technology/2011/04/internet-tv.html.

[20] *AllVid NOI, supra, citing* Letter from Neal M. Goldberg, Vice President and General Counsel, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, CS Docket No. 97-80, at 14 (statement of Commissioner Baker) (emphasis supplied).

the ban would impede BendBroadband from fulfilling its goal of creating an all-digital video service that would provide the public with otherwise unattainable benefits.

In recent years, a number of other operators have been granted waivers for similar reasons as well as on the basis of other arguments, including simple financial hardship. However, not all cable operators can meet the FCC's stringent waiver standards. This is particularly true for small cable operators. In any event, no cable operator should have to go to the expense and uncertainty of seeking a waiver of the FCC's outmoded and one-sided set-top box rules, and no consumer, whether the customer of a large successful system or a small struggling system, should have to bear the costs associated with Section 629, particularly when customers of cable's competitors do not face the same costs. The time has come for Congress to eliminate these rules.[21]

It is Time for Congress to Act.

The three examples I have discussed today illustrate how a regulated marketplace can end up being distorted if the government does not routinely review and update its role, particularly in the dynamic video world. I believe that the time has come for a comprehensive review of all of the rules governing cable television operators. However, I understand that such a review may not be feasible

[21] Many scholars who have analyzed Section 629 from a legal and economic perspective have concluded that it is time for Section 629 "to be put to bed." T. Randolph Beard, PhD, et al., Wobbling Back to the Fire: Economic Efficiency and the Creation of a Retail Market for Set-Top Boxes, 21 CommLaw Prospectus 1, 58 (2012).

over the next 18 months. Therefore, I would urge Congress to consider some targeted updates to the Communications Act as part of the STELA reauthorization process.

In conclusion, I want to commend your continued interest in these important issues and for holding this hearing today. I also want to acknowledge Representative Scalise and other Members who have advanced the debate on video reform. I believe it is time for Congress to take targeted action to modernize the rules governing the video market to reflect 21st Century realities. Simply hoping that the problems occurring in today's marketplace will go away on their own will not solve the breakdowns that are harming consumers. I am encouraged that the Subcommittee is engaging in this dialog.

Thank you. I would be happy to answer any questions you might have.

Mr. WALDEN. Thank you, Ms. Tykeson. We appreciate your comments and testimony. We look forward to continuing the dialog.

We will turn now to the managing director of Navigant Economics, Mr. Hal Singer, for your comments, sir. Thank you for joining us, and please go ahead.

STATEMENT OF HAL SINGER

Mr. SINGER. Thank you for having me. I have served as an economic expert in several program carriage complaints, including as an expert for the NFL Network, Tennis Channel, and Masson. The focus of my testimony is the proper regulatory oversight of vertically integrated cable operators, and the role of the FCC in that oversight process.

To design the proper regulatory framework, one must first understand the nature of the potential harm presented by vertical integration in the cable industry, namely a reduction in innovation among independent content providers.

Why do we care about that potential harm? Because some of the best content has sprung and will likely continue to spring from independents who are free from the strictures of a clumsy conglomerate when creating artistic expressions. Without any protection against discrimination, independents would be forced to surrender equity in exchange for carriage, and thus would be less willing to take risks, which would result in fewer programming choices and less programming diversity.

There are two schools of thought on how best to deal with this problem of vertical integration. The first, advocated by Professor Tim Wu of Columbia Law School, in his best-selling book "The Master Switch", is to ban vertical integration entirely. The second, which was embraced by Congress in the 1992 Cable Act, is to permit vertical integration but to police discriminatory acts on a case-by-case basis. The downside of an outright ban is that it sacrifices potential efficiencies related to vertical integration. The downside of a case-by-case approach is that if relief from discrimination does not come swiftly, or if the evidentiary burden imposed on an independent cannot be satisfied under any fact pattern, then after-the-fact adjudication affords no protection at all.

Assuming that case-by-case review is the best solution to the problem of vertical integration, the policy question turns to which legal framework is best suited for the task. Should the FCC adjudicate these disputes under its public interest standard, or should complaints of discrimination by a vertically integrated cable operator be addressed under the antitrust laws? The problem with the latter approach is that a reduction in innovation by independents may not be cognizable under the antitrust laws, which were designed primarily to prevent the exercise of pricing power. Because discrimination in program carriage often does not produce price effects, antitrust is the wrong framework to address discrimination by a vertically integrated cable operator.

The lack of price effects in these cases is also why it makes no sense to interpret the non-discrimination protections of the Cable Act in an antitrust context, even if Congress used the word "unreasonably" in the statute. By seeking to identify harm to an independent programmer rather than harm to competition, Congress

meant to fill a gap in antitrust laws, namely, the preservation of diversity in the video-programming marketplace. How do we know this? At the time the Cable Act was passed, the largest cable operator in the country, TCI, controlled less than 20 percent of national video subscribers. If Congress meant to import antitrust concepts into the Cable Act, as some now argue, then Congress also intended to immunize all vertically integrated cable operators, including TCI, from the non-discrimination protections of the Act, as none would have sufficiently high market shares to constitute monopoly power under the antitrust laws. The absurdity of this conclusion, that Congress passed redundant antitrust regulation that was applicable to no one, proves that the Cable Act has nothing to do with antitrust enforcement.

Finally, I would like to speak briefly about the appropriate evidentiary burden on complainants under the FCC-administered approach. The purpose of the non-discrimination protections in the Cable Act is to ensure that a vertically integrated cable operator does not consider the benefit to an upstream programming affiliate when deciding whether to carry a similarly situated independent network. There are two primary ways to establish evidence of this kind of "biased" decision-making. Complainants could show direct evidence that benefits to an upstream network were inappropriately considered. In the absence of such direct evidence, complainants could in theory establish that the downstream cable division incurred a loss by carrying the independent network narrowly. This finding would create a presumption that there was an offsetting benefit to the affiliated upstream network. However, with the exception of a handful of networks such as ESPN, most independent networks lack "must-have" status and thus would be hard-pressed to demonstrate any forgone benefit from broader carriage. Cable operators generally create value for their customers by offering a buffet of choices, rather than granting access to any particular network. Requiring an independent to estimate forgone benefits with precision would be tantamount to asking a leading columnist for the New York Times to estimate what fraction of subscribers would switch to another newspaper if the editorial page excluded that columnist. That the answer might be none, due to the costs of switching newspapers or due to customer loyalty attributable to the Times in general, does not imply that that columnist adds no value to the Times. Accordingly, complainants should not be required to estimate forgone benefits from broader carriage to prevail in a program-carriage complaint, as the current law now demands.

Thank you.

[The prepared statement of Mr. Singer follows:]

Testimony of Hal J. Singer, Ph.D.

BEFORE THE COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE OF COMMUNICATIONS AND TECHNOLOGY

"THE SATELLITE TELEVISION LAW: REPEAL, REAUTHORIZE, OR REVISE?"

JUNE 12, 2012

Summary of Testimony

- The potential harm presented by vertical integration in the cable industry is a reduction in innovation among independent content providers. The harm manifests itself in the form of fewer programming choices and less *programming diversity*; the harm does not necessarily involve a short-run price increase or output reduction, as one would expect to find from an antitrust violation.
- The Cable Act of 1992 sought to alleviate this potential harm by permitting vertical integration but policing discriminatory conduct on a case-by-case basis.
- A reduction in innovation by independents caused by discrimination may not be cognizable under the antitrust laws, which were designed primarily to prevent the exercise of *pricing power.* Accordingly, antitrust is not the proper framework to adjudicate discrimination complaints. Instead, the FCC should adjudicate these disputes under the public-interest standard.
- With the exception of must-have networks, because few cable customers would be willing to switch video providers due to the loss a single network, complainants should not be required to estimate forgone benefits from broader carriage to prevail in a program-carriage complaint.

Testimony

As the subcommittee on Communications and Technology considers reauthorizing the Satellite Act and possible changes related to the video marketplace, it should also evaluate the non-discrimination protections in the Cable Act and whether they work as intended. The focus of my testimony is the proper regulatory oversight of vertically integrated cable operators, and the role of the Federal Communications Commission (FCC) in that oversight process.

To design the proper regulatory framework, one must first understand the nature of the potential harm presented by vertical integration in the cable industry—namely, a reduction in innovation among independent content providers ("independents"). Why do we care about that potential harm? Because some of the best content has sprung and will likely continue to spring from independents, who are free from the strictures of a clumsy conglomerate when creating artistic expressions. Without any protection against discrimination, independents would be forced to surrender equity in exchange for carriage, and thus would be less willing to take risks, which would result in fewer programming choices and less *programming diversity*. For example, if an independent network knew that five years after its launch, it would be competing for the rights to a major sporting event against a vertically integrated cable operator that could deliver 30 million more viewers for its affiliated sports network at the flip of a "master switch," the independent might abandon the entire enterprise.

There are two schools of thought on how best to deal with this problem of vertical integration. The first, advocated by Professor Tim Wu in his best-selling

book *The Master Switch*, is to ban vertical integration entirely. The second, which was embraced by Congress in the 1992 Cable Act, is to permit vertical integration but to police discriminatory acts on a case-by-case basis. The downside of an outright ban is that is sacrifices potential efficiencies related to vertical integration. The downside of the case-by-case approach is that, if relief from discrimination does not come swiftly, or if the evidentiary burden imposed on an independent cannot be satisfied under any fact pattern, then after-the-fact adjudication affords no protection at all.

Assuming that case-by-case review is the best solution to the problem of vertical integration—and in light of recent proceedings, it is not clear whether that is the case—the policy question turns to which legal framework is best suited for the task: Should the FCC adjudicate these disputes under its public interest standard, or should complaints of discrimination by a vertically integrated cable operator be addressed under the antitrust laws? The problem with the latter approach is that a reduction in innovation by independents—the harm that the Cable Act intended to insure against—may not be cognizable under the antitrust laws, which were designed primarily to prevent the exercise of *pricing power*. As a practical matter, no private litigant would ever risk the resources to bring a discrimination case into an antitrust court unless it could also link the restraint to a short-term price or output effect. Because this will generally be impracticable, antitrust is the wrong framework to address discrimination by a vertically integrated cable operator. To borrow an analogy from labor laws, we do not turn a blind eye toward discrimination in the workplace so long as there is no associated

wage effect; rather, discrimination is pernicious because it denies an equally qualified applicant the opportunity to compete on a level playing field.

The lack of price effects in these cases is also why it makes no sense to interpret the non-discrimination protections of the Cable Act in an antitrust context—even if Congress used the word "unreasonably" in the statute. By seeking to identify harm to an independent programmer rather than harm to competition, Congress meant to fill a *gap* in antitrust protection—namely, the preservation of diversity in the video-programming marketplace. How do we know? At the time the Cable Act was passed, the largest cable operator in the country, TCI, controlled less than 20 percent of national video subscribers. If Congress meant to import antitrust concepts into the Cable Act, as some now argue, then Congress also intended to immunize *all* vertically integrated cable operators, including TCI, from the non-discrimination protections of the Act, as none would have sufficiently high market shares to satisfy the monopoly-power requirement of the antitrust laws. The absurdity of this conclusion—that Congress passed redundant antitrust regulation that was applicable to no one—proves that the Cable Act has nothing to do with antitrust enforcement. It also proves that discrimination by a vertically integrated cable operator is best adjudicated by the FCC under the public-interest standard.

Finally, I would like to speak briefly about the appropriate evidentiary burden imposed on complainants under this FCC-administered approach. The purpose of the Cable Act is to ensure that a vertically integrated cable operator does not consider the benefit to its upstream programming affiliate when making carriage decisions of a similarly situated independent network. There are two

primary ways to establish evidence of this kind of "biased" decision-making. Complainants could show *direct* evidence that benefits to an upstream network were inappropriately considered. In the absence of such direct evidence, complainants could in theory establish that the downstream cable division incurred a loss by carrying the independent network narrowly; this finding would create a presumption that the vertically integrated operator would not have incurred such a loss without there being an offsetting benefit to the upstream network. However, this *indirect* method of proof is often thwarted by the fact that many episodes of tiering do not entail a change from broad carriage to narrow carriage, which could permit estimation of the cable operator's forgone benefits from broader carriage. Moreover, with the exception of a handful of networks such as ESPN, most independent networks lack "must-have" status and thus would be hard-pressed to demonstrate any forgone benefit from broader carriage. Cable operators generally create value for their customers by offering a *buffet* of choices as opposed to granting access to any particular network. Requiring an independent to estimate forgone benefits with precision would be tantamount to asking a leading columnist for the *New York Times* to estimate what fraction of subscribers would switch to another newspaper if the editorial page excluded that columnist. That the answer might be none—due to the costs of switching newspapers or due to customer loyalty attributable to the paper's content generally—does not imply that the columnist adds no value to the *Times*. Accordingly, complainants should not be required to estimate forgone benefits from broader carriage to prevail in a program-carriage complaint, as the current law now demands. By making the evidentiary

burdens under the case-by-case approach too extreme, we risk undermining the non-discrimination protections of the Cable Act. And if that's the case, then Professor Wu's suggested remedy of an outright ban is the only remaining policy option to protect against the harm of vertical integration.

Mr. WALDEN. We appreciate your testimony. Thank you.

And now we will go to our final witness, a senior fellow at Tech Freedom, Mr. Jeffrey Manne. Thank you for being here, and we look forward to your testimony.

STATEMENT OF GEOFFREY MANNE

Mr. MANNE. Thank you, Mr. Chairman, Ranking Member, members of the subcommittee. In addition to being senior fellow at Tech Freedom, I am also Executive Director of the International Center for Law and Economics, and a lecturer in law at Lewis and Clark Law School in Portland.

If you remember three words from my testimony today, remember these: House of Cards. Netflix's hit show encapsulates how fundamentally the video marketplace has changed since Congress enacted the special regulations that now govern that market. It represents the work of a new form of distribution, a new source of content creation. It is based on new technology. It is rapidly innovating. Those regulations are themselves a house of cards as well.

In the face of technological change, shifting consumer preferences, and evolving policy aims, the complex fragile structure that shapes conduct by consumers, content owners, distribution networks, and regulators is bound to fall down. Its purpose is frustrated, unintended consequences its legacy.

To start, STELA should be allowed to sunset the compulsory license limit and copyright protection for video content repealed. Congress should also repeal the related provisions of the Cable Act, retransmission consent, program access and carriage, must carry, among others, and Congress shouldn't extend this regime to—regulatory regime online. This isn't deregulation; this is smarter regulation. Because behind all of these special outdated regulations are laws of general application that govern the rest of the economy, antitrust and copyright. These are better, more resilient rules. They are simple rules for a complex world. They will stand up better as video technology evolves, and they don't need to be sunsetted.

The FCC's numbers say that cable prices went up 20 percent between 2006 and 2010, but adjusting for inflation, they went up only 10 percent. Meanwhile, the number of channels increased 42 percent. Spending on programming went up 30 percent. Americans spent 20 percent more time watching video, and then there is an endless range of quality improvements that went along with it. To say that the current market is in any way constrained, anti-competitive, or crabbed, seems very difficult to sustain.

In short, consumers are getting more for their money, more content, more choices, and higher quality.

If Netflix were regulated like a cable network, it is not likely that the law would allow it to offer exclusive programs like House of Cards. Why invest $100 million in a franchise if it doesn't offer you a leg up on your rivals? Exclusive programming helps drive competition.

The key to promoting competition in both video and broadband isn't restricting programming innovation, if we are looking for rules to change, it is removing local regulatory impediments to competitive infrastructure, like franchise licensing and access to rights of

way. Allowing more towers to be built would mean faster 4G wireless service, making 4G wireless yet another established competitor to legacy cable and satellite.

And intense competition in some markets can benefit consumers everywhere. I would just point out when we are looking at potential problems of the absence of localized competition, it turns out, of course, that these are all networks. Competition from Verizon's FIOS in New York City, for example, has driven Cablevision to enter into a peering agreement with Netflix's CDN. That means better Netflix streaming for customers outside New York as well. Competition need not be local to have local benefits.

So what should Congress do? Again, let STELA sunset. A clean reauthorization of STELA isn't clean at all. STELA is a mess. We need rules that minimize error costs but affects policy goals in a fashion that is least likely to outlaw by default that which we actually want to encourage, only haven't discovered yet; that is, regulatory mistakes discovered only in retrospect, and mistakes have been made. Aereo exploits imprecise language in the definition of copyrights performance right to navigate around the overly complex effort to use compulsory licensing, must carry, et cetera, aimed at bolstering cable's competitiveness and promoting localism. But arguably, a simple copyright rule of general applicability, full performance right protection retained and enforced by the copyright holder, would have avoided the problem entirely.

While the interest of the dwindling percentage of Americans who view television programming only on-the-air shouldn't be ignored, we really have to take seriously the possibility that serving this segment under the current regulatory regime carries with it enormous costs that outweigh the benefits. These cost include, most significantly, retransmission fees passed on to MVPD viewers, technological and business model constraints, and most importantly, the enormous opportunity costs, perhaps as much as $1 trillion of more efficiently deploying spectrum currently used for broadcasting.

I want to address quickly also the program access and program carriage rules. These rules eschew antitrust rules to promote program diversity and competition among providers. By focusing on the program carriage and program access rules as they are constructed, we have shifted the terms of the analysis to a starting point that sort of assumes that all content should be available everywhere, but that not all content is available from all distribution channels is not proof of market failure. Similarly, equating diversity with independence is inappropriate. If independence means not affiliated with the distribution network, this amounts to a preference for ABC's The Bachelor over NBC's The Biggest Loser. Program carriage rules, in contrast to antitrust, problematically prescribe an undesirable effect—not an undesirable effect, but a particular business model, and it is a mistake to try to prescribe a particular business model when we don't know in the future what the optimal business model will look like.

Ending the current regulations won't leave consumers unprotected. There is a role for the law here, but the role for the right law, which is antitrust and copyright.

Thank you.

[The prepared statement of Mr. Manne follows:]

The Future of Video Marketplace Regulation

Written Testimony of

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&

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on

"The Satellite Television Law:
Repeal, Reauthorize, or Revise?"

Before the House of Representatives'
Energy and Commerce Committee

June 12, 2013

THE FUTURE OF VIDEO MARKETPLACE REGULATION

The Future of Video Marketplace Regulation

Executive Summary

- The media landscape has fundamentally changed since 1992, and is still evolving rapidly, with advances in technology, evolving market structure, new business models and a consistent shift among viewers from traditional sources of content to online sources.
- Court decisions may remove several pieces of the current system, forcing reform:
    - The Second Circuit recently held that Aereo did not violate copyrights by retransmitting online content that was originally broadcasted over the air—without paying for it. If the decision stands, broadcasters will insist on a legislative fix.
    - Must-carry and program access rules may eventually be struck down under the First Amendment because cable operators no longer have the "gatekeeper" power that caused the Supreme Court to uphold must-carry in the mid-1990s.
- The most constitutionally sound—and best—way to govern the video marketplace is to rely on rules of general applicability to govern market power:
    - **Antitrust**: Antitrust is the best tool for policing evolving markets, to ensure that distributors with market power do not use their power to harm consumers, while recognizing the benefits that come from experimentation in new organizational forms and business models for delivering video content to consumers.
        - The legal standard matters more than which agency is applying it, but the FCC has a poor track record of applying antitrust statutes.
    - **Copyright-based rules**: so long as programmers have a clear property right, they can negotiate with MVPDs and OVDs—or become their own OVD.
        - Congress should remove the compulsory license restriction on content owners' copyrights and end the must-carry/retransmission consent system.
- Online Video Distributors are taking off. Competition for OVDs is truly one click away.
- While some claim that online video is the "new satellite," the situation today is entirely different from that faced by DBS in the 1990s. Today we have growing intermodal competition, not only among MVPDs but also broadband providers.
    - In theory, MVPDs that also offer broadband connection might be able to thwart OVD competition if basic data tiers were set low enough, and prices for additional data set high enough, whether or not they exempted their own streaming content from such tiers. But it's hard to see how today's current tiers (e.g., 300GB and $10 for 50GB more) discourage anyone from cutting the cord. Antitrust has likely already encouraged higher tiers and lower prices for additional data.
- The market for delivering video content, whether by MVPDs or OVDs that rely on broadband, could certainly be made more competitive, but not by regulating video programming. Congress should focus on removing barriers to building out wireline and

wireless infrastructure at the local level, opening up more spectrum for wireless uses, and rationalizing subsidies intended to promote broadband adoption.

  - The point is not only that 4G wireless might become a far more effective conduit for video programming than is currently imagined, such as through 4G Broadcasting, but also that exclusive arrangements may be key to incentivizing the development of such technology and should not be prohibited in advance.

- There are smarter ways to promote localism and access to free content than propping up the technological system of broadcasting. The costs of the current system most significantly retransmission fees passed on to MVPD viewers, technological and business model constraints (the development of possible online or other alternatives is retarded by the regulations protecting local broadcasters). Perhaps greatest of all is the enormous opportunity cost of the more efficiently using the spectrum currently used for broadcasting.
- Today's byzantine regulations put just about every party involved (with the exception of the broadcasters) in a worse position than they would be in if the regulations didn't exist at all.
- The provisions most directly at issue in this proceeding govern the relationship between distribution and content. But the concern animating efforts to preserve or extend those provisions – that vertical integration or monopoly power by distribution providers leads inexorably to problematic discrimination against content owners – is weak. Increased competition among MVPDs, the rise of OVDs and the complex market realities of content production and distribution today serve to ameliorate this threat.
- The debate about video programming rests on significant misconceptions:
  - Consumers are getting more, not less, for their money. Average MVPD prices went up just 10% from 2006 to 2010 in real terms, but programming choice exploded, programming expenditures increased, and new features proliferated.
  - An MVPD maximizes revenues not by keeping all others' content off its network or subjugated to remote tiers but by finding the combination of channels that minimizes its costs while maximizing the benefits to consumers
  - That not all content is available from all distribution channels is not proof of market failure. Exclusive arrangements and differential treatment of content among distribution channels facilitate the very dynamism that has led this market to thrive.
  - Ironically, those who demand *a la carte* programming also insist the FCC should have forced Comcast to include in the expanded basic tier the Tennis Channel – one of those less-watched channels that supporters of the Program Access rules elsewhere complain that competitors and Comcast subscribers must accept in order to get more valuable content.
- MVPDs and network content owners should be able to negotiate directly with each other and their respective counterparties (subscribers for MVPDs and affiliate stations for networks) free of the rules that prohibit certain efficient contractual relationships and inefficiently shape others.

- Broadcasters exaggerate harm that would result from dismantling the compulsory license and must-carry/retransmission consent regimes. That the broadcasters' arguments don't promote the public interest is betrayed by their inconsistent support for the broadcast television compulsory licensing scheme (of which they are a net beneficiary) and rejection of a compulsory license for radio performances of copyrighted works (into which they would be a net payor).

THE FUTURE OF VIDEO MARKETPLACE REGULATION

Introduction

Today's video marketplace is shaped by a byzantine set of rules from a bygone era. In the 1990s, cable was as mighty as the Byzantines themselves were at the height of their power: Cable's control over the single physical conduit to the home gave cable providers gatekeeper power over video programming, much as the Byzantines' control over the Eastern Mediterranean gave them control over commerce.

But cable today is simply one of several competing conduits for video programming distribution. Today's regulations were intended to prevent cable from thwarting the rise of satellite DBS service. They have succeeded: Virtually the entire country has access to the two primary DBS providers in addition to a cable provider. Meanwhile, telcos like AT&T and Verizon have offered a *fourth* alternative to cable in a third of the country. Even more importantly, the MVPD paradigm is increasingly being challenged by consumers either switching to an OVD like Netflix, Hulu or Amazon ("cord-cutting") or cutting back on their MVPD subscription and relying, in part, on an OVD ("cord-shaving").

In other words, competition is thriving - and not just in the dimensions Congress conceived of twenty years ago. This should cause legislators to revisit the fundamental, if implicit, assumption on which most video regulation currently rests: that antitrust law is insufficient to protect consumers, and must be supplemented with industry-specific regulations. This is the essential debate of all regulatory policy, and it hinges on whether sufficient market power exists across the board to justify replacing antitrust principles of general application, adjudicated primarily on an *ex post* basis, with sector-specific regulations imposed *ex ante*.

Where market power might continue to exist, in particular geographic markets or in particular circumstances, its abuse can be handled under antitrust principles by the FTC and DOJ through enforcement of Sections 1 and 2 of the Sherman Act. In theory, antitrust standards could be applied by the FCC as well, but Congress has already tried giving the FCC antitrust standards in the 1992 Cable Act—which the FCC has contorted into what is essentially a *per se* rule rather than the rule of reason that Congress clearly intended.

Antitrust, properly understood, is preferable as a standard for governing the evolving video marketplace precisely because it is a more resilient, economically-grounded form of law. We need, to borrow legal theorist Richard Epstein's memorable phrase, "simple rules for a complex world."

Further, the often-voiced concern that an MVPD could monopolize a market and begin charging higher and higher prices while offering less and less content makes no economic sense. An MVPD doesn't maximize revenue by keeping all others' content off its network or subjugated to remote tiers, but by finding the combination of channels that minimizes its cost while maximizing the benefits to consumers. Even if an MVPD were an absolute monopolist, it would still consider what consumers wanted, and even under the most draconian monopoly assumptions, consumers would still get *most* of what they want at a price they are willing to pay—or else the monopolist wouldn't maximize its revenue.

In contrast to the Cable Act's outright (*per se*) bans on specific conduct that may not actually harm competition or consumers, relying on antitrust enforcement to govern industry organization in the satellite and cable markets would better serve consumer interests. Moreover, it would allow the market to evolve more rapidly and efficiently by limiting the often enervating, unintended consequences of government intervention to instances when actual harm to consumers can be established. The market has evolved in ways even the most prescient market analyst could not have foreseen 20 years ago when the Cable Act was written. The market changed radically as the Satellite Home Viewer Act of 1999 (SHVA) begat the Satellite Home Viewer Extension and *Reauthorization* Act of 2004 (SHVRA), which begat the Satellite Television Extension and Localism Act of 2010 (STELA), now up for renewal. The market will continue to evolve going forward in ways that we cannot predict today. Allowing the Cable Act's and STELA's most problematic provisions to remain on the books allows the government to pick winners and losers in the future of this industry, something it is not qualified to do. STELA (and its predecessors) and the Cable Act were written to promote competition and to protect consumers, but the market fundamentally changed long ago, becoming quite competitive.

Rather that continuing to try to tweak the laws of a bygone era, Congress should embrace the default tool for dealing with market power across the economy: antitrust law. Properly applied, antitrust is perfectly capable of governing a market in which programmers have clear property rights for their content. Indeed, antitrust is the best tool for policing market power in evolving (if not perfectly competitive) markets, to ensure that distributors with market power do not use their power to harm consumers, while recognizing the benefits that come from experimentation in new ways and business models for delivering video content to consumers.

The provisions most directly at issue in this proceeding govern the relationship between distribution and content. But the concern animating efforts to preserve or extend those provisions – that vertical integration or monopoly power by distribution providers leads inexorably to problematic discrimination against content owners – is weak. Increased competition among MVPDs, the rise of OVDs and the complex market realities of content production and distribution today serve to ameliorate this threat.

Addressing the merits of STELA reauthorization or reform first requires an understanding of the dynamics of the broader home video distribution market, and especially the evolving nature of competition and how it has affected consumers.

Value for the Consumer

Critics of the modern video content distribution landscape claim that consumers are paying more and getting less, and they use these claims to support retention or expansion of regulations ostensibly aimed at preserving competition.[1] Whatever the merits of their specific regulatory proposals, however, these underlying claims are weak.

Market competitiveness *is* the right touchstone—but proof of it lies in the pudding. As the FCC's Video Competition report appropriately notes:

> The structural and behavioral characteristics of a competitive market are desirable not as ends in themselves, but rather as a means of bringing tangible benefits to consumers such as lower prices, higher quality, and greater choice of services. To determine if the market for the delivery of video programming is producing these kinds of positive outcomes, we look at video prices and provide current prices for a sample of video packages offered by some MVPDs. [2]

But the way the report presents cable pricing data has made it easy for some advocates to argue that the video marketplace is less competitive than it actually is by claiming that rising prices betray structural problems in the market. In nominal dollars, the average price paid for a cable subscription increased a total of 20% from 2006 to 2010.[3] But in real terms, adjusting for inflation, the increase was only 10% (or an average of 2.52% per year).

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[1] *See, e.g., Hearing on The State of Video Before the Subcomm. on Commc'ns, Tech., & the Internet of the S. Comm. on Commerce, Science, & Trans.*, 113th Cong. 10–11 (2013) (statement of John Bergmayer, Senior Staff Attorney, Public Knowledge) [hereinafter *Public Knowledge, State of Video Testimony*], *available at* http://www.publicknowledge.org/files/State%20of%20Video%20Senate%20Hearing%20-%20PK%20Testimony%205-14-13.pdf.

[2] Federal Communications Commission, *In The Matter Of Annual Assessment Of The Status Of Competition In The Market For The Delivery Of Video Programming, Fourteenth Annual Report*, MB Docket No. 07-269, at ¶ 134 (July 20, 2012) [hereinafter *Fourteenth Video Competition Report*].

[3] Federal Communications Commission, *Report on Cable Industry Prices*, MM Docket No. 92-266 at 9, Table 3 (Mar. 9, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-377A1.pdf.

Even this might suggest to some that the marketplace is insufficiently competitive. Local franchising authorities have the ability to regulate prices for the basic tier of cable service, but, to the chagrin of some advocates, they are not required to do so.[4]

But it is not clear that price regulation would reduce prices beyond those delivered by the market. Most importantly, even this 10% real price increase does not account for improvements in product *quality*, which must be taken into account in an assessment of price for value, particularly in a dynamic market such as this one. A few quantitative measures illustrate the point:

- The total number of cable channels available to consumers increased from 565 in 2006 to approximately 800 in 2013,[5] an increase of about 42%.
- Total spending on programming increased 29.18%[6] during this period in real, inflation-adjusted dollars. This comparison offers perhaps the best proxy for the increase in programming quality.
- Indeed, 2010 programming expenditures increased by 2.28%[7] more than the average cable price[8] (both in real, inflation-adjusted dollars). This comparison shows, quite literally, that consumers are getting more programming quality for their money.
- Americans continue to be voracious consumers of TV content, watching 4:39 of live television per day,[9] a slight uptick from 4:37 in 2006[10] (not even including content viewed online). When the average of 26 minutes of time-shifted DVR playback per day is included as well as an average 27 minutes with video online and through mobile devices,[11] the total time spent daily watching TV jumps to 5:32, an increase of 19%.

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[4] Federal Communications Commission, *Regulation of Cable TV Rates*, http://www.fcc.gov/guides/regulation-cable-tv-rates (last visited June 9, 2013).

[5] *Industry Data*, NCTA, https://www.ncta.com/industry-data (last visited June 9, 2013) [hereinafter *Industry Data*]; *see also* Federal Communications Commission, *Notice of Proposed Rule Making*, MB Docket Nos. 12-68, 07-18, 05-192 at ¶26 (March 20, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-30A1.pdf.

[6] Meg James, *Cable TV Networks Feel Pressure of Programming Costs*, LOS ANGELES TIMES (Dec. 8, 2011), http://articles.latimes.com/2011/dec/08/business/la-fi-ct-cable-economics-20111208 (reporting that the amount TV networks spent on programming increased by about 9% annually over the period 2006-2010 to over $21 billion in real, inflation-adjusted dollars by the end of that period).

[7] *Id.* (*citing* SNL Kagan) (reporting that networks spent over $21 billion on programming in real, inflation-adjusted dollars in 2010, up from about $20 billion the year prior. Average real prices over that year increased at a lower rate of 1.28% in real terms. Thus the ratio of total network spending on programming to average cable prices increased by 2.28% in real terms in 2010.).

[8] Federal Communications Commission, *Report on Cable Industry Prices*, MM Docket No. 92-266 at 9, Table 3 (Mar. 9, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-377A1.pdf.

[9] The Nielsen Company, *A Look Across Screens: The Cross Platform Report* (2013), *available at* http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2013%20Reports/Q1-2013-Nielsen-Cross-Platform-Report.pdf

[10] The Nielsen Company, *Historical Daily Viewing Activity Among Houses & Person 2+* (2009), *available at* http://www.nielsen.com/content/dam/corporate/us/en/newswire/uploads/2009/11/historicalviewing.pdf

[11] Marketing Charts Staff, *TV Still the Dominant Video Viewing Medium; Mobile on the Rise*, MARKETING CHARTS (Sep. 12, 2012), http://www.marketingcharts.com/wp/television/tv-still-the-dominant-video-viewing-medium-mobile-on-the-rise-23329/.

- 9% of cable customers have already "cut the cord," choosing to view video content exclusively online without an MVPD subscription, while a further 13% of consumers with a broadband connection have "shaved the cord," paying for a less expensive cable package because they can get much of the content they want online.[12]

If just these quantitative factors are properly accounted for, consumers actually come out well ahead between 2006 and 2010: They are paying somewhat more to get a lot more choices, a lot more content, and higher quality content. Comparatively, the price per viewing hour of cable, $0.23 per viewing hour, is still much lower than other kinds of entertainment, like a trip to the movie theater, a sporting event or even a DVD rental.[13]

Moreover, having more channels isn't better simply because having more choices is better. The exploding number of channels also means the availability of more tailored content: offerings that allow a viewer to find a category of "curated" content in one place, thus minimizing search costs. In other words, quantity and quality of content could stay exactly the same and there would still be an overall quality increase due to specialization of channels. For example, even if a channel like SyFy shows mostly reruns and creates relatively little original content, its existence probably significantly increases the value of cable for consumers interested in science fiction.

And this does not even account for greater non-price improvements in distribution services launched during the 2006-2010 period, including, among other things:

- The advent of TV Everywhere[14]
- Video quality improvements,[15] including expanded HD channel offerings[16]
- Video compression improvements[17] (increasing DVR capacity and facilitating HD transmission)
- A doubling of broadband speeds—relevant because broadband is generally bundled with MVPD service, and faster broadband means higher-quality OVD choices as well as streaming of TV Everywhere, especially to mobile devices in the home[18]

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[12] *Fourteenth Video Competition Report*, *supra* note 2, at para 341.
[13] *See Industry Data*, *supra* note 5.
[14] Rob Pegoraro, *Comcast, Time Warner Announce "TV Everywhere" Initiative*, THE WASHINGTON POST (June 24, 2009); see also Paul Madsen, *How Does TV Everywhere Work?*, BROADCAST ENGINEERING (Mar. 11, 2013).
[15] Anders Bylund, *From Cinepak to H.265: a brief history of video compression*, ARS TECHNICA (Dec 22 2009), http://arstechnica.com/gadgets/2009/12/from-cinepak-to-h265-a-survey-of-video-compression/
[16] Richard Lawler, *HD Channel Expansion Roundup*, Engadget (May 3, 2010), http://www.engadget.com/2010/05/03/hd-channel-expansion-roundup/
[17] Anders Bylund, *From Cinepak to H.265: a brief history of video compression*, ARS TECHNICA (Dec 22 2009), http://arstechnica.com/gadgets/2009/12/from-cinepak-to-h265-a-survey-of-video-compression/
[18] Federal Communications Commission, *National Broadband Plan: Connecting America*, at xi (March 16, 2010), *available at* http://www.broadband.gov/plan/executive-summary/; *see also* Federal Trade Commission, *Broadband Performance*, OBI

- Access to MVPD content from Xbox and other innovative set-top boxes[19]
- Expanded On Demand Services[20]
- New Features, including:
  - DVR Developments[21]
  - "Start Over" and "Look Back" Features[22]
  - Caller ID on TV[23]

Thus properly understood, price for value seems to have significantly *decreased.* This should make policymakers question whether continued regulation of the video marketplace is necessary—and, certainly, question the need to extend existing regulations, as some have proposed.

Structure of the Video Distribution Market

Concerns about market structure boil down to two claims, both greatly exaggerated:

1. **Horizontal**: cable providers have too much control over access to content by competing providers, including satellite, new MVPDs like FiOS, U-Verse and Google Fiber, or online video distributors (OVDs); and
2. **Vertical**: vertically integrated cable providers have an incentive to favor their own content and to withhold access by competing content providers to their broad subscriber base.

Vertical Integration

We discuss vertical integration in the video market at length below. Contrary to popular assumption, the rate of vertical integration has plummeted since the Cable Act was enacted. One chart says it all:

Technical Paper No. 4, at 11 (Aug. 16, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-300902A1.pdf (Cable broadband speeds nearly doubled from 2006-2010 and increased at a roughly 20% compound annual growth rate from 1997-2010).

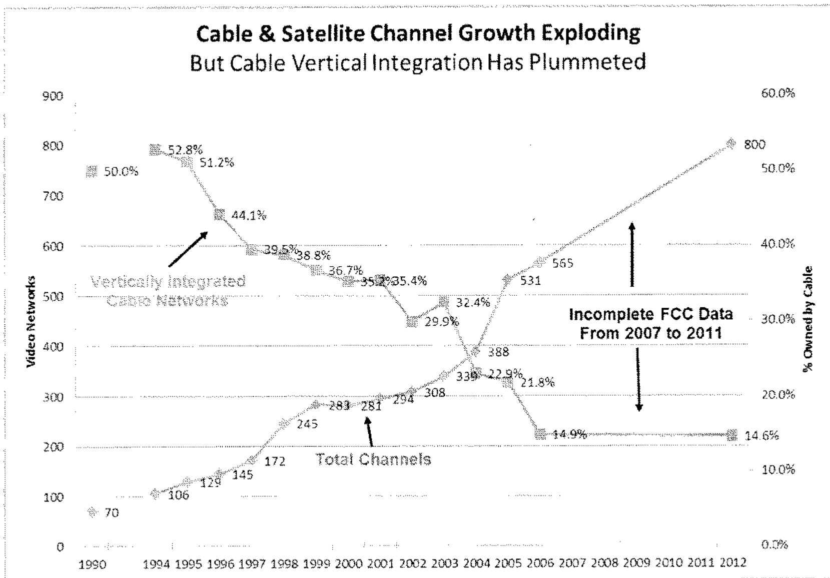
[19] Todd Spangler, *AT&T Gets Game on With U-verse TV on Xbox 360s*, MULTICHANNEL NEWS (Oct. 11, 2010), http://www.multichannel.com/telco-tv/att-gets-game-u-verse-tv-xbox-360s/128245.

[20] *See 20 Billion Views Reached on Xfinity On Demand*, http://www.comcast.com/Corporate/About/PressRoom/20-Billion.html (last visited June 9, 2013).

[21] DIRECTV has a DVR integration that now allows 5 channels to be recorded simultaneously. (*TiVo HD DVR from DIRECTV*, DIRECTV, http://www.directv.com/technology/tivo_receiver (last visited June 9, 2013)).

[22] Victor Godinez, *Time Warner Cable Launching New Start Over And Look Back Features For Dallas-Area TV Subscribers Who Forget To Record Their Shows*, DALLASNEWS (July 23, 2011), http://techblog.dallasnews.com/archives/2011/07/time-warner-cable-launching-ne.html.

[23] *Home Phone Caller ID on TV*, OCEANIC TIME WARNER CABLE, http://www.oceanic.com/products/phone/residential/features/id_on_tv (last visited June 9, 2013).



It is worth noting that the FCC simply stopped including the total number of networks beginning with 2007 data, providing only the number of affiliated networks in the last several Video Competition Reports. This made it impossible to calculate the percentage of vertical affiliation and naturally led the reader to assume that cable must be steadily increasing its control over content.[24] At best, this is highly misleading. At worst, it is a deliberate misrepresentation of a key statistic in the debate, burying the truth: cable's "power" has waned considerably.

Of course, channels are an imperfect proxy because, as noted below,[25] channels are themselves bundles of shows, and measuring affiliation of *shows* would be a far better metric of the things Congress was concerned about in passing the Cable Act and STELA in the first place (the ability of MVPDs to foreclose distribution market competition by limiting entrants' access to content) as well as the things critics of the current marketplace tend to worry about (the idea that vertical integration discourages content production and access). Unfortunately, this imperfect proxy is the best measure of vertical integration we have. And what it shows is clear: The degree of vertical

[24] *See* Federal Trade Commission, *Notice of Proposed Rulemaking,* In MB Docket Nos. 12-68, 07-18, 05-192, pp. 66-69, Table 2 (Mar. 20, 2013) (Table 2 lists 117 "Cable-Affiliated, Satellite-Delivered, National Programing Networks"); *see also Industry Data supra* note 5 (estimating a total of 800 channels). Dividing 117 by 800 produces the 14.6% as depicted in the table above.

[25] *See infra* pp. 53-57.

integration has essentially stagnated at a level (15%) less than a third that existing at the time Congress enacted the 1992 Cable Act.

Video Distribution Channels

The market for home viewing of video is more competitive than it's ever been, and more competitive than many critics seem willing to admit. At the time of the Cable Act's passage in 1992, cable operators served 95% of multichannel video subscribers, the first DBS satellite had not been launched, and telephone companies were statutorily barred from providing video programming. It was against this backdrop that the Supreme Court declared in the 1994 *Turner* decision, upholding must-carry: "A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch."[26] Whatever "gatekeeper" or "bottleneck" power cable might have had twenty years ago, clearly no longer exists. Competition from satellite and now telco providers have whittled cable's MVPD market share down to 57.4%—and growing numbers of Americans are dropping MVPD subscriptions altogether in favor of Internet video services. As Comcast noted in its comments on the FCC's most recent Video Competition Report:

> Over 98 percent of Americans can choose from three or more multichannel video programming distributors ("MVPDs"); non-cable MVPDs gained over 1.8 million net subscribers over the course of the last 12 months; and online video consumption continues to increase at an unprecedented rate, with 184 million users watching nearly 37 billion online content videos in July 2012.[27]

In 2006, a mere 4.7% of Americans had access to at least four MVPDs. By 2010, with either Verizon FiOS or AT&Ts U-Verse competing with cable and the two DBS providers in many markets, 32.8% of Americans had access to at least four MVPD choices.[28] DIRECTV, Dish Network, Verizon, and AT&T are now the second, third, fifth, and seventh largest MVPDs, respectively, by number of subscribers.[29] The two largest DBS providers, DIRECTV and Dish Network, now serve approximately 33.8% of MVPD subscribers nationwide.[30] And these providers, like their competitors, continue to innovate and offer valuable services like HD channels[31] and popular exclusive programming.[32]

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[26] *Turner Broadcasting System, Inc. v. FCC*, 512 US 622,656 (1994).
[27] Comments of Comcast Corp., *In The Matter Of Annual Assessment Of The Status Of Competition In The Market For The Delivery Of Video Programming*, MB Docket No. 12-203, at 1 (2012), *available at http://ecfsdocs.fcc.gov/filings/2012/09/10/6017110280.html*.
[28] *Fourteenth Video Competition Report*, *supra* note 2, at ¶ 40, tbl. 2.
[29] *Industry Data*, *supra* note 5.
[30] See Ian Olgeirson et al., *Video Losses Moderate in Q2, Multichannel Penetrations Dip*, SNL KAGAN (Aug. 13, 2012), http://www.snl.com/InteractiveX/ArticleAbstract.aspx?id=15622945.
[31] *DISH Network Claims They Have More HD Channels Than DIRECTV? Is This True?*, DIRECTV, http://support.directv.com/app/answers/detail/a_id/2783/~/dish-network-claims-they-have-more-hd-channels-thandirectv%3F-is-this-true (last visited June 9, 2013).

Meanwhile, online services like Netflix, Hulu, Amazon and YouTube continue to add subscribers and improve their product offerings through technological, business model and programming innovations. Netflix alone has 29 million domestic subscribers, eclipsing even Comcast's 22 million.[33] Competition for OVDs is truly one click away.

The FCC notes that as of June 2011, 83% of Americans have at least two wireline broadband providers and 41.5% of Americans have access to three or more wireline broadband providers.[34] Fiber service, which some critics argue is crucial to reaping the benefits of the Internet,[35] is becoming widely available as Verizon FiOS (16.5 million)[36] and AT&T U-verse (30 million)[37] fiber-based services reach more than 46 million homes combined, approximately 40% of U.S. homes.

4G LTE wireless networks offer additional competition, and these services can already deliver speeds comparable to many wireline services.[38] In April 2012, 20% of U.S. smartphone owners said they watched a video on their phone at least once a month. Nine months later, in January 2013, that number had risen to 41%.[39] Ericsson estimates that "67 percent of consumers use mobile devices (tablet, laptop or smartphone) for consumption of TV services. Furthermore the research shows that over 50% of TV consumption on smartphone happens outside of the home (on mobile networks)."[40] Verizon Wireless LTE will reach 285 million Americans by mid-year 2013 and the company recently launched a fixed residential LTE service.[41] With the fixed residential LTE service,

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[32] Press Release, DIRECTV, *DIRECTV's Audience Network Goes 'ROGUE'* (May 10, 2012), *available at* http://news.directv.com/2012/05/10/directvs-audience-network-goes-rogue/.

[33] Brad Reed, *Netflix has already recouped its $100 million House of Cards investment*, YAHOO! NEWS (Apr. 23, 2013), http://news.yahoo.com/netflix-already-recouped-100-million-house-cards-investment-011527993.html.

[34] NTIA, *National Broadband Map* (June 30, 2012), http://www.broadbandmap.gov/summarize/nationwide (last visited June 9, 2013).

[35] *See generally, e.g.*, Susan Crawford, CAPTIVE AUDIENCE (2013)

[36] Verizon, *Investor Quarterly Fourth Quarter 2011* (Jan. 24, 2012), http://www22.verizon.com/idc/groups/public/documents/adacct/2011_4q_quarterly_bulletin.pdf.

[37] Press Release, AT&T, *Best-Ever Mobile Broadband Sales and Strong Cash Flows Highlight AT&T's Fourth-Quarter Results; Stock Buyback Begins on Previous 300 Million Share Authorization* (Jan. 26, 1012), *available at* http://www.att.com/gen/press-room?pid=22304&cdvn=news&newsarticleid=33762 (reporting that AT&T surpassed its goal of 30 million living units).

[38] Roger Yu, *Questions to consider in deciphering 4G technology*, USA TODAY (Feb. 2, 2012), http://www.usatoday.com/tech/products/story/2012-02-24/4g-network-questions/53234664/1.

[39] Josh Luger, *These 5 Mobile Video Data Points Will Blow Your Mind*, BUSINESS INSIDER (June 5, 2013), http://www.businessinsider.com/these-10-mobile-video-data-points-will-blow-your-mind-2013-6

[40] Press Release, Ericsson, *World's first complete solution for broadcast video over LTE networks* (Feb 25, 2013), *available at* http://www.ericsson.com/news/1680666.

[41] *4G Home Broadband*, VERIZON WIRELESS, http://www.verizonwireless.com/b2c/homefusion/hf/main.do (last visited June 9, 2013).

"average speeds will initially range from 5-12Mbps down and 2-5Mbps up"[42] and theoretical speeds could be well above the currently offered broadband service.[43] By comparison, Netflix recommends a streaming rate of 3 Mbps for DVD-like quality on a large screen (1 hour = 1.4 Gb),[44] 1.5 MBps for acceptable quality, and 700kbps for mobile phone screens (1 hour = .315 Gb).[45] So current 4G service is perfectly capable of streaming high-quality video; the only question is how to manage competing demands for bandwidth on a network whose capacity at any given moment is significantly more limited than cable or fiber.

To put the numbers in perspective:

Service	**Monthly Data tier**	**Monthly streaming**	**Daily Streaming**	**Monthly Price**	**Additional Data Price**
Comcast	300 GB	214h (DVD quality[46]	7h	$85	$10 for 50GB
Verizon Home LTE	20 GB (optional)	14h20 (DVD quality) 28h40 (standard)	0h30 1h	$130 or $110 in family plan	$10 for 2GGB
Verizon Mobile	6GB (optional)	46h40 (phone quality)[47]	1h33	$80 (includes unlimited calling & texts)	$10 for 2GGB (6h20/monthly)

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[42] Neal Gompa, *Verizon Wireless launches LTE-based home broadband: $60 gets you 10GB*, EXTREMETECH (Mar. 6 2012, 1:15 PM), http://www.extremetech.com/mobile/121255-verizon-wireless-launches-lte-based-home-broadband-60-gets-you-10gb.

[43] Sean Hollister, *Verizon LTE torture test: Why 4G can't replace your DSL (yet)*, THE VERGE (Nov. 23, 2011, 1:45 PM), http://www.theverge.com/2011/11/23/2578711/verizon-lte-explained ("That may not sound like a lot, but...[a]ccording to content delivery network Akamai's latest "State of the Internet" report, the *average* US broadband connection is just 5.1 megabits per second. That's enough to play back Netflix and YouTube 1080p content, which tops out at around 5Mbps...[W]hether you live in Chicago, Manhattan, or San Jose, LTE speeds are pretty great. We averaged 10.51Mbps down and 5.83Mbps up across our three test sites.").

[44] *Internet Connection Speed Recommendations*, NETFLIX.COM, https://support.netflix.com/en/node/306 (last visited June 9, 2013); *see also Bandwidth Conversion Calculator*, FORRET.COM, http://web.forret.com/tools/bandwidth.asp (last visited June 9, 2013).

[45] *Internet Connection Speed Recommendations*, NETFLIX.COM, https://support.netflix.com/en/node/306 (last visited June 9, 2013).

[46] *See, e.g.*, Neil Hunt, *Netflix Lowers Data Usage By 2/3 For Members In Canada*, NETFLIX US & CANADA BLOG (Mar. 28, 2011), *at* http://blog.netflix.com/2011/03/netflix-lowers-data-usage-by-23-for.html.

[47] Opanga Networks, Inc., *Streaming Video and Wireless: A Fundamental Mismatch?*, p. 3, table 1 (2010), http://www.virtualpressoffice.com/JPContentAccessServlet?fileContentId=1000000013630&source=sd&showId=756.

Obviously, at current prices, 4G service will not be a cost-effective substitute for a wireline connection for today's typical video consumer. But for consumers who watch significantly less video than average and prefer to watch video on a mobile device, 4G may allow them to watch the video they want, where they want it, that they can cut the cord to a wireline provider completely, relying on 4G for data service and an OVD for content. But as more spectrum becomes available, and to the extent that wireless companies are able to construct more towers to increase capacity with the same amount of spectrum, prices per gigabyte should fall over time. Meanwhile, compression technology will continue to reduce the amount of data required to view the same quality of video.

But this paradigm of viewing 4G service, as a more capacity-constrained version of the Internet, may soon prove outdated. Verizon is expected to deploy a broadcast model over 4G in time for the 2014 Super Bowl, and could use the technology to more efficiently replicate the broadcast model, as the MIT Technology Review explains:

> Putting data in broadcast mode reduces congestion but makes the most sense in situations where everyone is watching the same newscast, sports match, or other special piece of content at the same time. In such situations, using LTE Broadcast mode, a carriers' transmitter needs to just send a signal out over one channel rather than separate ones for each mobile device. That's how the traditional TV broadcast works: it doesn't matter if 100 or a million people are watching, because the content is out there for the taking.
>
> The software in a carrier's base station can tweak the LTE signal to include one or more channels that work in broadcast mode–enabling multiple users to receive the same content at the same time.[48]

It is not difficult to imagine such a technology being combined with something akin to the DVR model, allowing consumers to view, at their convenience, content sent to their phones by 4G broadcasting. Nor is it difficult to imagine the emergence of something like a VOD model, where consumers can have content they subscribe to sent to their phones or home 4G router (with attached hard drive).[49] This is precisely the sort of innovative arrangement that the law should encourage, not discourage.

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[48] David Talbot, *Broadcast Video Will Soon Be Packed into Smartphone Signals*, MIT TECHNOLOGY REVIEW (May 6, 2013), http://www.technologyreview.com/news/513311/broadcast-video-will-soon-be-packed-into-smartphone-signals/
[49] *See also infra* at 21.

Online Video Distributors

Combined with the increasing availability of broadband, the growth in OVD and other online alternatives (like YouTube) to cable and satellite present yet more viable competitors to any alleged distribution monopoly.[50]

Amazon, Hulu, Netflix and YouTube are all offering popular – and exclusive – original programming, and each of the first three of these services has signed deals with a range of content owners to provide (sometimes exclusive) content online.[51] Netflix now has more U.S. subscribers than HBO.[52] And shows aired on ad-supported cable networks are increasingly catching up with network broadcast programming in popularity. Meanwhile, half the successful offerings on Kickstarter are for film, video and music,[53] and a new Veronica Mars movie that seemingly wouldn't otherwise have been made raised over $5 million there and will be produced.[54]

But it is important to note the limitations of this seeming disintermediation and crowd-funding. While these are important sources of competitive pressure for traditional content providers and distribution networks, the unique economics of high-fixed-cost content production and distribution remain. A single episode of *Game of Thrones* costs $6 million to produce,[55] and Netflix reportedly spent $100 million to develop two seasons of *House of Cards*.[56] Misleading claims of cable's unprecedented profitability notwithstanding, the cable industry has invested $200 billion in capital projects since 1996,[57] and while Comcast and Time Warner Cable earned a five year-average Return on Invested Capital (ROIC) of 4.5%[58] and -1.3%,[59] respectively, Apple's five year average ROIC is 32%[60] and Google's is 16%.[61]

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[50] Andrew Wallenstein, *The Big Bet at Intel Corp. That Could Change TV*, VARIETY (Apr. 3, 2013, 3:00 PM), http://variety.com/2013/tv/news/intel-the-big-bet-that-could-change-tv-1200332075/ (reporting that Intel is creating an internet-based competing product to traditional cable).

[51] Timothy Stenovec, *Amazon, Viacom Announce Prime Instant Video Streaming Deal*, HUFFINGTON POST (June 4, 2013, 9:00 AM), http://www.huffingtonpost.com/2013/06/04/amazon-viacom-prime-instant-video_n_3382985.html.

[52] Andrew Wallenstein, *Netflix reports 29.17 million subs in 1Q, edging out HBO's 28.7 million*, VARIETY (Apr. 22, 2013, 1:13 PM), http://variety.com/2013/digital/news/netflix-surpasses-hbo-in-u-s-subscribers-1200406437/

[53] *Kickstarter* Stats, KICKSTARTER, http://www.kickstarter.com/help/stats (last visited June 9, 2013).

[54] Rob Thomas, *The Veronica Mars Movie Project*, KICKSTARTER (Mar. 13, 2013), http://www.kickstarter.com/projects/559914737/the-veronica-mars-movie-project.

[55] *'Game Of Thrones' Costs $6 Million Per Episode?*, CONTACTMUSIC (May 28, 2012), http://www.contactmusic.com/news/game-of-thrones-costs-6-million-per-episode_1333082

[56] Brad Reed, *Netflix has already recouped its $100 million House of Cards investment*, YAHOO! NEWS (Apr. 23, 2013), http://news.yahoo.com/netflix-already-recouped-100-million-house-cards-investment-011527993.html

[57] *Industry* Data, NCTA, http://www.ncta.com/industry-data (last visited June 9, 2013).

[58] *Comcast on the Forbes Global 2000 List*, FORBES (May 2013), http://finapps.forbes.com/finapps/jsp/finance/compinfo/Ratios.jsp?tkr=cmcsa.

[59] *Time Warner on the Forbes Global 2000 List*, FORBES (May 2013), http://finapps.forbes.com/finapps/jsp/finance/compinfo/Ratios.jsp?tkr=twc

[60] *Apple on the Forbes Global 2000 List*, FORBES (May 2013), http://finapps.forbes.com/finapps/jsp/finance/compinfo/Ratios.jsp?tkr=AAPL

Contrary to the claims of some critics,[62] both the content and distribution markets have perhaps never been as competitive as they are today. Even leaving aside the next tier of companies that own the channels that air enormously popular programs like *Mad Men*, *Breaking Bad,* and *The Walking Dead,* each of the six largest media companies (Disney, Time Warner, Viacom, Comcast/NBCU, News Corp and CBS) owns a number of popular channels and program franchises, and each of these vies with the others to develop or purchase successful programming. At the same time online distributors like Hulu, Amazon, YouTube and Netflix are producing their own, increasingly popular programming.

How the Law Should Address Market Structure

Even if cable or DBS does achieve a dominant market position in any particular market, that does not necessarily mean that special regulations are necessary beyond antitrust law. Taking undue prescriptive regulatory action punishes success gained by risking private capital. Like companies in any other market, video providers should be able to obtain "dominant" positions through innovation and investment. Intervention is justified only if the dominant firm or firms abuse their dominance in contravention of antitrust law. This Administration's Department of Justice acknowledged as much in its comments on the National Broadband Plan:

> We do not find it especially helpful to define some abstract notion of whether or not broadband markets are "competitive." Such a dichotomy makes little sense in the presence of large economies of scale, which preclude having many small suppliers and thus often lead to oligopolistic market structures. The operative question in competition policy is whether there are policy levers that can be used to produce superior outcomes, not whether the market resembles the textbook model of perfect competition. In highly concentrated markets, the policy levers often include: (a) merger control policies; (b) limits on business practices that thwart innovation (e.g., by blocking interconnection); and (c) public policies that affirmatively lower entry barriers facing new entrants and new technologies.[63]

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[61] *Google on the Forbes Global 2000 List*, FORBES (May 2013), http://finapps.forbes.com/finapps/jsp/finance/compinfo/Ratios.jsp?tkr=goog

[62] *See, e.g., Public Knowledge, State of Video Testimony, supra* note 1, at 2 ("[D]espite all of the great programming and groundbreaking devices, many Americans are locked into a television business model that limits competition and choice: the expensive bundle of channels. Most of the most popular programming is not available except through traditional subscription TV services, and these grow more expensive year after year."); CRAWFORD, *supra* note 35.

[63] Ex Parte Submission of the United States Department of Justice, *In re Economic Issues in Broadband Competition,* GN Docket No. 09-51, at 11 (Jan. 4, 2010), *available at* http://www.justice.gov/atr/public/comments/253393.pdf.

Critics' concerns are indicative of their status quo bias.[64] Such policy discussions need to take a longer view of the market. While today, critics fret over the "dominance" of cable, the conversation may soon switch to one over the dominance of fiber.[65]

To the extent that facilities-based competition is not as robust as some theoretical ideal, at least some of the blame must be laid at the feet of local franchise authorities. While the 1992 Cable Act nominally precludes local authorities from granting exclusive cable franchises or unreasonably refusing to award competitive franchises, as a practical matter franchise regulations still amount to an important deterrent to new entry of MVPDs—and thus ISPs as well. This doubly restrains competition in the video marketplace, both from new MVPDs and from OVDs that rely on broadband to reach consumers.

To be sure, the costs of building physical infrastructure are even more substantial, but the pattern of Google Fiber's growth (as well as that of AT&T's U-Verse) demonstrates both that providers are willing to incur these costs, and that they will do so only where costly local regulations can be avoided.

As many as 30,000 jurisdictions issue video franchises.[66] Twenty states offer statewide franchise licenses, and these have significantly improved entry in those states. But these reforms, and the FCC's 2006 ban on exclusive franchise licensing, has not removed local governments as a barrier to new entry of ISP-cum-MVPDs such as Verizon FiOS or Google Fiber. The franchising processes, fees and imposed terms vary, and can significantly delay entry and even deter it entirely. In addition, "excessive build-out mandates, the inclusion of non-video revenue in franchise 'fees' (including advertising fees), and demands unrelated to the provision of video service" significantly

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[64] Such as when Susan Crawford, author of CAPTIVE AUDIENCE (CRAWFORD, *supra* note 35), declared fiber "future proof" for the next 50 to 100 years when discussing her book at with Diane Rehm. *The Diane Rehm Show: Susan Crawford: "Captive Audience"* (WAMU radio broadcast Jan. 10, 2013), *transcript available at* http://thedianerehmshow.org/shows/2013-01-10/susan-crawford-captive-audience/transcript.

[65] *See, e.g., Wallenstein, supra* note 50; Adam Thierer, *The Rule Of Three: The Nature of Competition In The Digital Economy*, FORBES (Jun. 29, 2012, 6:35 PM), http://www.forbes.com/sites/adamthierer/2012/06/29/the-rule-of-three-the-nature-of-competition-in-the-digital-economy/ ("The graveyard of tech titans is littered with the names of many other once-mighty giants. Schumpeter's 'gales of creative destruction' have rarely blown harder through any sector of our modern economy.") (*quoting* Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* 84 (Harper Perennial, 1976)).

[66] *See, e.g.*, William R. Richardson, *FCC Releases New Rules to Streamline the Local Cable Franchising Process for Telephone Companies and Other New Video Entrants*, WILMERHALE (Mar. 28, 2007), http://wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=90848. Note also that, in 2007 when the FCC adopted franchise reform regulations, "Verizon estimates, for example, that it will need 2,500-3,000 franchises in order to provide video services throughout its service area. AT&T states that its Project Lightspeed deployment is projected to cover a geographic area that would encompass as many as 2,000 local franchise areas." (Federal Communications Commission, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, at 8 (Mar. 5, 2007), *available at* http://www.tiaonline.org/gov_affairs//fcc_filings/documents/FCCVideoSec621--Order.pdf).

raise the costs of entry in many jurisdictions.[67] Likewise, regulatory difficulty obtaining pole attachment rights and access to rights of way can prevent infrastructure construction.[68]

The original justification for franchising (consumer protection from natural infrastructure monopoly), although never very strong in the first place,[69] is no longer relevant:

> A large factor in the monopoly status of cable television operators is that no viable technology provided true competition to the array of services available through cable during the 1970s and early 1980s. The further development of competing technologies and services over the next two decades, however, created viable alternatives that weakened cable's *de facto* monopoly status. Thus, after the 1996 Act permitted telephone companies to enter the video marketplace, telephone companies and the improvements of DBS systems posed a significant threat to the monopoly status of cable television.[70]

The existence of viable, willing facilities-based competitors leaves, ironically, franchise regulations standing in the way of infrastructure competition, rather than facilitating it.

And this limitation importantly applies to broadband access, as well. Because OVDs reach consumers via broadband networks, local constraints on the construction of broadband infrastructure generally are problematic. Importantly, it is these regulatory constraints, not theoretical economic constraints, that limit the extent of competition from broadband-delivered OVDs (and the development of broadband itself).

As Google Fiber's experience demonstrates, investment and innovation won't occur where regulatory impediments make them uneconomical. As Milo Medin, Google's vice president for access services, testified last year, "regulations – at the federal, state, and local levels – can be central factors in company decisions on investment and innovation. . . . [Regulation] often results in unreasonable fees, anti-investment terms and conditions, and long and unpredictable build-out

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[67] Fred Campbell, *What Google Fiber Says about Tech Policy: Fiber Rings Fit Deregulatory Hands*, TECH LIBERATION FRONT, August 7, 2012, http://techliberation.com/2012/08/07/what-google-fiber-says-about-tech-policy-fiber-rings-fit-deregulatory-hands.

[68] See, e.g., *American Electric Power Service Corp. v. FCC*, No. 11-1146 (D.C. Cir. Feb. 26, 2013) (upholding FCC regulations mandating local authorities ease certain pole attachment restrictions).

[69] *See* Thomas W. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 U. PA. L. REV. 1335 (1986)

[70] Jonathan E. Samon, *When "Yes" Means No: The Subjugation of Competition and Consumer Choice by Exclusive Municipal Cable Franchises*, 34 SETON HALL L. REV. 747, 762 (2004).

timeframes . . . [that] increase the cost and slow the pace of broadband network investment and deployment."[71]

Wireless providers aren't immune from local regulatory impediments, either. Tower siting, small cell antenna attachment and other infrastructure restrictions have delayed the updating and expansion of mobile broadband networks, as well.[72]

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Critics like Susan Crawford see broadband as a natural monopoly, with economies of scale making competition impossible. But Google, AT&T and Verizon don't seem to agree – as long as indefensible regulatory impediments don't interfere. Google Fiber isn't just a publicity stunt; Google expects it to make money from the endeavor.[73] AT&T is eager to replace its outdated switched networks with all-IP ones. This will bring U-Verse to nearly a third of the country (with data speeds of 45-75 mbps), thus offering both another MVPD service and another channel by which consumers can access OVD content.

Most importantly, wireless services can check the power of wireline. One study predicts that, "As digital consumers become more reliant on their smartphones and tablets for everyday content consumption, we can expect this [mobile] share [of internet traffic] to rise over time and perhaps take over majority share during the course of the next year."[74] Even full-length video streaming, supposedly the unassailable lynchpin of the "cable monopoly," is well within the technical capacity

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[71] Field Hearing on Innovation and Regulation before the S. Comm. on Oversight & Gov. Reform, 112TH CONG. (Apr. 18, 2011), available at http://oversight.house.gov/wp-content/uploads/2012/01/TestimonyofMiloMedin_1.pdf (testimony of Milo Medin, Vice President of Access Services, Google Inc.).

[72] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 24 F.C.C.R. 13994, 14006, 14008 (2009) (finding that "record evidence demonstrates that unreasonable delays in the personal wireless service facility siting process have obstructed the provision of wireless services").

[73] Scott Canon, *Google Fiber's gigabit gamble has implications far beyond KC, The Kansas City Star* (Sept. 24), http://www.kansascity.com/2012/09/24/3832330/google-fibers-gigabit-gamble-has.html

[74] comScore, *Mobile Future In Focus 2013* (Feb 2013), *available at* http://www.comscore.com/Insights/Presentations_and_Whitepapers/2013/2013_Mobile_Future_in_Focus ("[A]n unduplicated view of digital media audiences and consumption across desktop computers, smartphones and tablets, reveals that more than 1 in 3 minutes (37 percent) is now spent beyond the PC.").

of wireless: Consumers increasingly prefer to watch such videos on phones and tablets,[75] and mobile video now comprises the majority of all mobile traffic.[76] While doubtless some of this traffic flows over Wi-Fi, some of it doesn't, and 4G download speeds and advanced devices clearly facilitate increasing wireless/wireline *and* video competition.

Wireless services are already evolving to deliver video, especially to mobile devices. For example, news recently broke that Verizon and ESPN are in negotiations to offer ESPN video content to consumers without counting the data streaming against monthly data plans.[77] We rebut the presumption that such "discrimination" harms consumers below,[78] and here simply note that this kind of arrangement is precisely the kind of innovative business model that could allow 4G wireless service to become yet another distribution channel for OVD content.

If 4G Broadcasting succeeds, it will likely involve such partnerships, especially for content that, unlike sports programming, need not be broadcast live. Much of what consumers want to watch is predictable in advance: they work their way through an entire season or series of a show, and increasingly watch it at their convenience. Or, they might work their way through a queue of movies and TV shows. Especially popular forms of such content could be provided through 4G broadcasting, while the "long tail" of content might be downloaded over the network through standard 4G network technology—but not counted against data caps—when wireless network capacity isn't being utilized, such as during the night, and then stored on a consumer's mobile device or perhaps on a network attached-storage device—a hard drive built into a 4G home modem that doubles as a Wi-Fi hotspot for the home. The point is not only that 4G wireless might become a far more effective conduit for video programming than is currently imagined, but also that exclusive arrangements may be key to incentivizing the development of such technology and should not be prohibited in advance. Again, antitrust principles, properly understood, are perfectly capable of governing concerns about such relationships—without unduly deterring innovation in technologies and business models (the two often go hand in hand) that benefit consumers.

Market Dynamism

The key point to understanding market conditions and thus regulatory responses in these markets – as in all high-tech markets – is dynamism. The status quo never remains the status quo for long, and regulatory responses (to say nothing of repeal of regulations) are inevitably behind the curve,

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[75] *Global Video Index: 2012 Year in* Review, OOYALA, http://www.ooyala.com/online-video-index/global-video-index-2012-year-review (last visited June 10, 2013).
[76] *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2012–2017*, CISCO 1 (Feb. 6, 2013), http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.pdf
[77] Bret Swanson, *Verizon, ESPN, And The Future Of Broadband*, FORBES (June 4, 2013, 5:10 PM), http://www.forbes.com/sites/bretswanson/2013/06/04/verizon-espn-and-the-future-of-broadband/
[78] *See infra* pp. 57-61.

responding to market conditions that no longer exist by the time regulations are implemented. These markets are full of examples of the types of transformative innovations that undermine competitive assumptions that underlie regulatory arguments. In addition to the general description of market evolution described above, a few examples will illustrate this point:

- **Online-only Content**: "Internet-delivered TV, which until recently was unready for prime time, is the new front in the war for Americans' attention spans. Netflix is following up on the $100 million drama 'House of Cards' with four more original series this year. Microsoft is producing programming for the Xbox video game console with the help of a former CBS president. Other companies, from AOL to Sony to Twitter, are likely to follow. The companies are, in effect, creating new networks for television through broadband pipes and also giving rise to new rivalries – among one another, as between Amazon and Netflix, and with the big but vulnerable broadcast networks as well."[79]
- **TV-Everywhere**: "First popularized by Comcast & Time Warner in 2009... Time Warner claims that over 40 participating networks are involved in deployments and trials. Additionally, a May 2012 report from Parks & Associates cited significant growth in TV Everywhere deployments."[80] Fox's model, for example, allows subscribers to access Fox's streaming shows and videos through various distribution channels. "Fox moved to the TV Everywhere model in August 2011, initially with only Dish as a partner. Previously, the broadcaster had provided new episodes for free to everyone the day after they air on Fox.com and Hulu; now, however, fresh content is available exclusively to TVE partners for eight days... Meanwhile, Fox also has VOD agreements for next-day episodes with a larger set of providers, including Comcast, Time Warner Cable, Cox Communications, Cablevision Systems and Bright House Networks, as well as AT&T U-verse and Verizon FiOS."[81]
- **LTE video**: "LTE Broadcast using evolved Multimedia Broadcast Multicast Service (eMBMS) is a multicast technology that industry players believe will take off this year... Verizon Wireless is working to deliver multicast video to customers using LTE Broadcast, joining a list that reportedly includes Clearwire and others.[82]
- **Microsoft Xbox**: "With more than 3 times as many subscribers as Comcast, Xbox is in prime position to shake up the cable industry because the device is already in so many living rooms...A key principle of disruptive technology is that the original supply does

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[79] Brian Stelter, *Don't Touch That Remote: TV Pilots Turn to Net, Not Networks*, N.Y. TIMES (Mar. 4, 2013), http://www.nytimes.com/2013/03/05/business/media/online-only-tv-shows-join-fight-for-attention.html?_r=0.
[80] Paul Madsen, *How Does TV Everywhere Work?*, BROADCAST ENGINEERING (Mar. 11, 2013).
[81] Todd Spangler, *Fox Trots U-Verse into 'TV Everywhere' Dance*, MULTICHANNEL NEWS (Mar. 19, 2013, 5:21 PM), http://www.multichannel.com/telco-tv/fox-trots-u-verse-tv-everywhere-dance/142285.
[82] Phil Goldstein, *LTE Video Broadcasting - Top Wireless Technologies in 2013*, FIERCEWIRELESS (Feb. 20, 2013), http://www.fiercewireless.com/node/240647/print.

> not equal the market demand. Disruptive companies take the Field of Dreams approach to innovation: build it and they will come. They anticipate and shape future demands. Even though video and Internet integration are secondary features on the Xbox behind video games, customers' preferences will evolve....As consumer demands evolve, the demand for video options on Xbox will increase and content providers and sports leagues will eventually be forced to give Xbox users the same programming options that they give to cable companies."[83]

Changing the Definition of MVPD

Even as the paradigm of the 1992 Cable Act has become increasingly irrelevant, some have proposed extending it to online video providers.[84] Indeed, several OVDs have attempted to take advantage of MVPD status.

Aereo and ivi are OVDs that have found themselves sued for copyright violations they are alleged to have committed by retransmitting broadcast signals over the Internet without permission. MVPDs have access to compulsory licenses that prevent them from having to negotiate copyright contracts for every signal they retransmit, but the compulsory license benefit doesn't extend to Online Video Distributor. These situations have sparked a debate about whether the definition of MVPD should be expanded to include Internet/Over-the-top video services—either within the current statutory scheme or by amending it.

While some OVDs might gain some competitive advantage from being treated as MVPDs, it is far from clear that Internet video in general (Hulu, YouTube, etc.) would be improved if subjected to the Cable Act's regulatory requirements. That regulatory burden would include program carriage, Equal Employment Opportunity requirements, and emergency requirements, as well as several other technical requirements. These laws were intended to govern the monopoly video distribution service that existed in 1992—not OVDs—and Internet content providers never expected to have to abide by them. Many OVDs are unwilling and perhaps financially unable to take on these requirements. So, ironically, these requirements could act as a barrier to entry for Internet-based competitors to traditional MVPDs—precisely the opposite of what the Cable Act was intended to do: protect new distribution models from the once-mighty power of cable.

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[83] Daniel O'Connor, *Xbox Edges Closer to Disrupting Cable TV*, DISRUPTIVE COMPETITION PROJECT (Sept. 19, 2012), http://www.project-disco.org/cord-cutting/xbox-edges-closer-to-disrupting-cable-tv/.

[84] Comments of Public Knowledge, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, at 7 (June 8, 2011), *available at* http://www.publicknowledge.org/files/docs/PK_Comments_MVPD-Competition-Report.pdf.

In the current competitive climate, it doesn't make sense to treat these different distribution platforms differently—and the same is true for satellite and cable MVPDs, as well. But nor does it make sense to harmonize regulatory regimes around the most restrictive of these; the benefits of harmonization can much better be achieved by removing regulatory burdens from no-longer-dominant market actors.

Similarly, competition would be promoted by removing outdated regulatory benefits from market actors where these stand in the way of this continued evolution of the industry. We turn to these regulations, most directly at issue in the reauthorization of STELA, first.

Broadcasters and the Satellite and Cable Rules

Several of the provisions at issue in STELA (along with related provisions elsewhere in the Communications Act and the Copyright Act) significantly affect the economic fortunes – and continued viability – of local over-the-air broadcasters; the risk of their repeal or amendment understandably concerns the broadcasters. Particularly at stake is the possible loss of an estimated $2.4 billion in annual retransmission fees, climbing to perhaps $6 billion by 2018.[85]

Companies like Aereo and the courts' treatment of them might well be the catalyst that pushes the industry toward a resolution that, as it happens, tracks the alleged justification for local broadcasters' favorable treatment in the first place:

> The head of the board that represents Fox-affiliated stations said Tuesday that it backed Mr. Carey [News Corp.'s president], and suggested that the stations could start broadcasting two flavors, a light version over the airwaves that would be without hit sports and entertainment programming, and a fuller version for subscribers to cable and satellite providers that pay the necessary fees.[86]

To the extent that the defense of local broadcasters' possession and retention of compulsory license, must-carry, retransmission consent, non-duplication and syndication exclusivity rights (among others) can be explained by a public policy preference for subsidizing the creation and distribution of local news, emergency information and advertising, the (admittedly, perhaps only rhetorical) proposal by Fox-affiliated stations would preserve these products on the free airwaves and remove the implicit subsidy from independently economically valuable programming.

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[85] *SNL Kagan Updates Retransmission Fee Projections to $6B by 2018*, PRWEB (Nov. 5, 2012), http://www.prweb.com/releases/2012/11/prweb10088524.htm.
[86] Brian Stelter, *Broadcasters Circle Wagons Against a TV Streaming Upstart*, N.Y. TIMES (Apr. 9, 2013) http://www.nytimes.com/2013/04/10/business/media/aereo-has-tv-networks-circling-the-wagons.html?pagewanted=all&_r=0.

While the interests of the dwindling percentage of Americans who view television programming only over the air should be considered, we must take seriously the possibility that serving this segment under the current regulatory regime carries with it enormous costs that outweigh the benefits. These costs include most significantly retransmission fees passed on to MVPD viewers, technological and business model constraints (the development of possible online or other alternatives is retarded by the regulations protecting local broadcasters). Perhaps greatest of all is the enormous opportunity cost of the more efficiently using the spectrum currently used for broadcasting. In 2009, economist Coleman Bazelon estimated the value of broadcast spectrum as $62 billion, minus $12 billion for buying out broadcasters and an additional $9 billion to provide free MVPD service to the 10 million households that then relied on over-the-air broadcasting. More importantly, he estimated the total economic benefit from reallocating broadcast spectrum to data services at between $500 billion and $1.2 trillion.[87] While highly notional, this provides some sense of the relative value of that spectrum as compared to its current, broadcasting uses.

These significant costs – imposed on everyone and multiplied because they retard the development of wireless technologies and thus overall economic growth – seem out of proportion to the perhaps 8% of the population who view television programming solely over the air[88] (or maybe it's 15%[89], depending who you ask; either way the point remains).

This doesn't mean we should abandon over-the-air viewers, who tend to be poor or elderly. Rather, it means that we – and they – would be better off with a different, better-targeted and more appropriate subsidy. There is a model for this, of course, in the digital TV transition. Although the digital transition threatened to harm poorer viewers who would be forced to buy new TVs or converters, rather than abandon the plan entirely, Congress authorized subsidies for the purchase of converters. While the problem here is unlikely to be solved with a one-time subsidy, in principle one can imagine a number of possible solutions (any of which might be funded several times over from the revenues of an auction of broadcast spectrum) including:

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[87] Coleman Bazelon, *The Need for Additional Spectrum for Wireless Broadband: The Economic Benefits and Costs of Reallocations* (October 23, 2009) (Consumer Electronics Association White Paper), available at http://apps.fcc.gov/ecfs/document/view?id=7020143019; *see also* John Eggerton, *CEA Study: Reallocating Broadcast Spectrum Could Yield $1 Trillion, Consumer Electronics Association submits economic study to FCC on value of spectrum reallocated for broadband wireless*, BROADCASTING & CABLE, (Oct 26, 2009).

[88] Joseph O'Halloran, *US Adults Loyal to Pay-TV But Tune Out of Over-the-Air*, RAPID TV NEWS (Jan. 6, 2011) ("[O]nly 8% [of US households] rely on over-the-air services.").

[89] Press Release, GfK Knowledge Network, *Over-The-Air Tv Homes Now Include 46 Million Consumers* (June 6, 2011), *available at* http://www.knowledgenetworks.com/news/releases/2011/060611_ota.html ("The 2011 Ownership Survey and Trend Report, part of The Home Technology Monitor™ research series, found that 15% of all U.S. households with TVs rely solely on over-the-air signals to watch TV programming; this compares with 14% of homes reported as broadcast-only for the previous three years.").

- Bazelon's proposed free lifetime MVPD service for those that currently rely on over the air broadcasting;
- Vouchers for MVPD service or data service that could be used watch OVD content; and
- A minimal tier of free content from local programmers (including today's broadcasters).

Such subsidies would impose a fraction of the costs of the current system—because it is so staggeringly expensive in its opportunity costs.

The broadcasters' vulnerable position is a relic of the morass of copyright and telecom rules that artificially create in them a property interest in MVPD retransmission of their broadcasts. But this regime makes little economic sense in the first place, and a proper understanding of the history and dynamics of the relevant provisions of the Copyright and Communications Acts counsels strongly in favor of their demise.

The Compulsory License, Must-Carry, Retransmission Consent and Other Carriage Rules

If Congress were to write a law today governing how MVPDs gain access to network content, it is hard to believe that it would come up with a system even remotely similar to that built out upon the 1992 Cable Act, the 1999 Satellite Home Viewer Improvement Act and its progeny, and the "transmit clause" and statutory license provisions of the 1976 Copyright Act. But compulsory licenses, must-carry, retransmission consent and the regulations that go along with them function just as they did when the Cable Act was enacted 21 years ago, despite significant changes in the video marketplace. This byzantine and discriminatory system should be repealed to allow for MVPDs to bargain for the rights to network programming on a level playing field and, *a fortiori*, it should not be applied to up-and-coming OVDs, as it will serve only to discourage investment in the industry.

The source of local broadcasters' economic interest in video content licensing by MVPDs lies initially in the decision by Congress to effect two significant reductions in established property rights: The enactment of a compulsory license for video performance and the imposition of must-carry.

Following the Supreme Court's *Fortnightly* decision,[90] which held that cable transmissions of broadcast content received by antenna were not public performances that infringed a content owner's performance right, Congress enacted the "transmit clause" of the 1976 Copyright Act,[91]

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[90] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968)
[91] 17 U.S.C.A. § 101 ("(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.")

specifically to bring cable retransmissions within the scope of a copyright owner's performance right: "[A] cable television system is performing when it retransmits the broadcast to its subscribers."[92] Thus, Congress restored full copyright protection against cable retransmissions to content owners.

At the same time, based on the belief that it was necessary to facilitate investments in cable systems, Congress granted a compulsory license for cable retransmissions at a statutorily defined rate in Section 111 of the Copyright Act.[93] This provision, titled a "*limitation* on exclusive rights" (emphasis added), explicitly abrogated the scope of a video content owners' copyright for the retransmission of broadcast video by a cable system. With the 1988 Satellite Home Viewer Act, Congress created a similar provision, Section 119 of the Copyright Act, for satellite providers. The current debate over renewing STELA is essentially a debate over extending this provision.

While well-intentioned, these provisions nevertheless diminished the scope of content owners' copyrights.

> A compulsory license is not only a derogation of a copyright owner's exclusive rights, but it also prevents the marketplace from deciding the fair value of copyrighted works through government-set price controls. . . . In the last five years, the cable industry has progressed from an infant industry to a vigorous, economically stable industry. Cable no longer needs the protective support of the compulsory license. ... A compulsory license mechanism is in derogation of the rights of authors and copyright owners. It should be utilized only if compelling reasons support its existence. Those reasons may have existed in 1976. They no longer do.[94]

Today, broadcast television is viewed by only a relatively small percentage of Americans, and by even fewer to the complete exclusion of other sources for similar content.[95] But in the years leading up to the passage of the 1992 Cable Act, broadcast television and cable were more-closely matched competitors. Congress thought it unfair for cable providers to be able to retransmit their competitors' broadcast signals without compensating them. So Congress required that cable companies and other MVPDs get broadcasters' permission before retransmitting their signals.[96] However, Congress didn't stop there. Driven by the desire to promote localism, Congress passed

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[92] H.R. Rep. 94-1476, 1976 U.S.C.C.A.N. 5659, at 63 (1976)
[93] 17 U.S.C. § 111(d)
[94] *Statement of Marybeth Peters, The Register of Copyrights before the Subcomm. on Courts & Intellectual Property of the Comm. on the Judiciary, United States House of Representatives*, 106TH CONGRESS, 2nd Session (June 15, 2000).
[95] Joseph O'Halloran, *US adults loyal to pay-TV but tune out of over-the-air*, RAPIDTV NEWS (Jan. 6, 2011), http://www.rapidtvnews.com/index.php/2011060112539/us-adults-loyal-to-pay-tv-but-tune-out-of-over-the-air.html#ixzz2VqUkzHG6.
[96] 47 U.S.C. § 325(b).

several other cable-specific regulations (network non-duplication[97] and syndicated exclusivity,[98] in particular) that left cable companies with the ability to negotiate with only one broadcaster for retransmission rights in each market. If a cable company couldn't come to an agreement with the one local broadcaster assigned to it, it simply couldn't carry a network's content; there was no alternative (although the broadcaster could, of course, always elect to exercise its must-carry rights, forcing the cable company to carry its signal at no charge).

The early days of retransmission consent were actually quite beneficial for cable customers. In exchange for allowing MVPDs to retransmit their signals, broadcasters asked them to carry new network-owned channels like FX and The History Channel.[99] There were suddenly a lot more channels for cable customers to watch. Eventually, however, broadcasters stopped asking for the carriage of these new channels and instead began asking for monetary compensation.[100] Knowing that cable companies essentially had no choice but to carry the networks, and given the customer demand for these channels, broadcasters began to demand higher and higher fees.[101] Cable providers had to either meet their demands or face network blackouts. These costs are now being passed on to their customers.

There is no longer any sensible rationale for prohibiting negotiation between MVPDs and content owners over retransmission rights. Today there are approximately 800 channels available on various MVPD systems, the vast majority of which are cable channels without broadcast transmissions and thus not subject to the statutory licenses. And yet MVPDs secure the rights to transmit these channels' programming content nonetheless. Moreover, a significant number of these channels are owned by broadcast networks, meaning retransmission rights for broadcast network programming could be negotiated in conjunction with already-existing licensing negotiations of non-broadcast content. And of course OVDs do not have recourse to the compulsory licensing provisions and nevertheless manage to negotiate comprehensive licensing deals including both broadcast and non-broadcast content, just as cable and satellite MVPDs do for retransmission rights to broadcast programming, where the local broadcaster is owned and operated by a network.[102]

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[97] 47 C.F.R. § 76.92-95.

[98] 47 C.F.R. § 76.101-110.

[99] *See* Comments of National Association of Broadcasters, *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, 54-55 (May 27, 2011), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021673096 [hereinafter *NAB Comments*].

[100] *History*, AMERICAN TELEVISION ALLIANCE, http://www.americantelevisionalliance.org/history/ (last visited June 11, 2013).

[101] *See* Comments of DIRECTV, Inc., In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, 4 (May 27, 2011), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021673116.

[102] *See, e.g.*, Mike Farrell, *Online Rights Figure Into New NBCU Deals*, MULTICHANNEL NEWS (Dec. 3, 2012), http://www.multichannel.com/internet-video/online-rights-figure-new-nbcu-deals/140497.

As noted, the compulsory licensing scheme on which retransmission consent is built is more accurately seen as a derogation of content owners' existing copyrights than as the establishment of a new, efficient property right held by broadcasters. Absent compelling efficiency justification there is no reason to preserve that right, and every reason to restore video content owners' copyrights to their full measure.

The establishment of the must-carry regime for cable providers in the 1992 Cable Act (as well as the "carry one, carry all" variant extended to satellite providers) effects a further derogation of property rights and is similarly an unwarranted intervention into market transactions.

The must-carry rules remove from distributors the right *not* to carry local broadcast channels. As a result, carriage negotiations with local broadcasters are lopsided. Content for which the broadcaster values retransmission more than the cable provider does (who is, of course, nevertheless the one with a financial interest in and knowledge about its subscribers) will be retransmitted, and cable MPVDs cannot demand compensation in return. Consumers will be saddled with basic tier programming of lower quality than they would prefer, and perhaps even see price increases for content they do prefer as cable providers move more programming to higher tiers. The must-carry rules require that, for cable providers offering 12 or more channels in their basic tier, at least one-third of these be local broadcast retransmissions.[103] The forced carriage of additional, less-favored local channels results in a "tax on capacity," and at the margins causes a reduction in quality (*e.g.*, a shift from CSPAN to home shopping channels).[104] In the end, must-carry rules effectively transfer significant programming decisions from cable providers to broadcast stations, to the detriment of consumers.

The deleterious effects of the must-carry provisions are exacerbated by the "basic tier" and "buy through" provisions of the Act. The basic-tier provision requires MVPDs to maintain a rate-regulated,[105] basic tier of service on which local broadcasters are entitled to carriage and which subscribers are entitled to purchase without being required to purchase other content.[106] The buy-through provision, meanwhile, prohibits MVPDs from selling subscriptions for higher content tiers unless subscribers have first purchased the basic tier.[107] These provisions serve to further constrain channel capacity and remove programming decisions from MVPD operators' control. Particularly in a market where competition has increasingly come from OVD providers offering unbundled access to premium-only content without any basic carriage or subscription requirements, these provisions reduce MVPD competitiveness. And although they may have inadvertently helped to fuel the

[103] 47 U.S.C. § 534.
[104] Thomas W. Hazlett, *Digitizing "Must-Carry" Under* Turner Broadcasting v. FCC (1997), 8 SUP. CT. ECON. REV. 141 (2000).
[105] Rates for the basic service tier and cable programming services tiers given in 47 CFR 76.922 (2010).
[106] 47 U.S.C. § 543(b)(7).
[107] 47 U.S.C. § 543(b)(8).

creation of, and demand for, all-you-can-eat and a la carte OVD services, the ever-increasing incidence of cord-cutting by would-be and former MVPD subscribers suggests these provisions increasingly do not reflect consumer preferences.

Although the ability of local broadcasters to opt in to retransmission consent in lieu of must-carry permits negotiation between local broadcasters and cable providers over the price of retransmission, must-carry sets a floor on this price, ensuring that payment never flows from broadcasters to cable providers for carriage, even though for some content this is surely the efficient transaction.

While even in an unfettered market networks may choose to structure their contracts with affiliated broadcasters to give them exclusive territories and the right to negotiate over retransmission of licensed content, there is no longer any basis for the government to prohibit direct licensing of copyrighted national broadcasts by the networks themselves. Instead, the current regulatory scheme largely removes any pretense of market involvement from the process of distributors acquiring access to broadcast content. In doing so, today's byzantine regulations manage to put just about every party involved (with the exception of the broadcasters) in a worse position than they would be in if the regulations didn't exist at all.

The Subscriber-MVPD Relationship

The relationship between subscribers and MVPDs is directly disrupted by must-carry, buy-through and basic tier provisions, which disadvantage both parties. Cable providers are required to carry all local broadcast stations on their basic tier of service, and customers are required to purchase this basic tier before they can purchase any additional service tiers. That means cable customers can't purchase just the higher tiers of service alone, which contain channels like HBO and the NFL Network. Whether they want it or not, they have to purchase the basic tier with all of the local broadcast content first and add on additional tiers of service from there.

Without these rules, cable customers and cable providers would have considerably more freedom in selecting which channels they actually want as part of their cable package. If subscribers don't value the channels on the basic tier (particularly the broadcast channels that cable companies are forced to provide), they could just bypass it and go right for the higher tiers of service. Although required for the effective operation of the compulsory license and must-carry/retransmission consent regime these rules enforce the unnecessary regime only by imposing significant harm on consumers.

The MVPD/Content Owner Relationship

By operation of compulsory licenses, must-carry and retransmission consent, MVPDs essentially have no direct relationship with broadcast network copyright holders. Compulsory licenses allow MVPDs to gain the public performance right to broadcast content by paying a statutory fee to the government for subsequent redistribution to copyright holders and prohibit direct negotiation over licensing terms by the parties.

The regime passes on the negotiation for rights to the broadcasters, and gives them the right to control what happens to their transmissions of content actually owned by the network. And non-duplication and syndicated exclusivity provisions prohibit networks from even assigning the right to control distribution negotiations to any particular affiliate by precluding negotiations between MVPDs and distant broadcasters over the retransmission rights to national programming.

Without these rules, MVPDs could go directly to the networks (or at least other broadcast affiliates) for access to the right to retransmit broadcast signals. MVPDs could then carry only the content that their customers want, at market-determined prices, and networks would, appropriately, retain based on copyright, the right to determine which providers could distribute their content and on what terms.

The MVPD/Broadcaster Relationship

Must-carry offers local broadcasters a spot in cable lineups in situations where cable companies might otherwise not carry those channels. It requires cable companies to set aside channels specifically for local broadcasters, and, if a broadcaster opts for must-carry, the cable company must retransmit its broadcast on one of the set-aside channels. Must-carry is most often used by smaller broadcasters whose channels are not in high demand by cable customers, and thus would likely not be carried if the cable company had meaningful programming discretion over local content. For DBS providers, must-carry works slightly differently. There is no obligation to carry local broadcasts, but if a DBS provider chooses to carry *one* local broadcast station's signal it must carry *all* local broadcast signals.

While these obligations sound sensible, they are unneeded in today's market. In the absence of the carriage and copyright rules, to the extent that demand for locally created content is sufficient to support local broadcast programming, MVPDs would have appropriate incentives to carry such content. To the extent that it is not (particularly when the local content is often available online), mandated access for local broadcasts does not serve consumer interests. Meanwhile, the rules that grant special privileges to local broadcasts of *national* programming inappropriately constrain market negotiations over this content in order to preserve guaranteed carriage of *local* content. But this is a costly means of encouraging carriage of local content, and the rules unnecessarily

burden MVPDs and harm consumers by taking up valuable channel space in MVPDs' lineups and constraining their bargaining power.

The more problematic alternative to must-carry, retransmission consent, began as a way to support local broadcasting, but has evolved into a system for the large broadcasting groups, and especially the networks themselves, to hold their signals hostage and charge ever-increasing fees to cable and satellite operators backed by blackout threats. Prior to the 1992 Act, cable companies were allowed to retransmit broadcast signals without permission as long as they paid a compulsory license fee to the copyright holders. Congress viewed this as a problem: Local broadcasters were largely left out of the loop because they didn't hold the copyrights for the most of the programming they broadcast.

At the very least, Congress should do away with the network non-duplication and syndicated exclusivity rules that prevent a cable provider from negotiating with any network broadcaster other than its one local network affiliate in each market. Doing so would give cable companies options other than a network blackout if they couldn't reach an agreement with their local broadcasters.

DBS providers are not subject to network non-duplication or syndicated exclusivity, but the goals of those regulations are merely accomplished through different mechanisms for satellite. STELA preserves the rule that distant signals may only be provided to viewers in "unserved households," meaning that there is not a local broadcaster providing them with a strong enough broadcast television signal.[108] If network non-duplication and syndicated exclusivity were eliminated, the rule for importation of distant signals for DBS providers must also be modified to keep the playing field level for all MVPDs. This could be accomplished by allowing DBS providers to import distant signals in the event that a retransmission consent negotiation was at an impasse.

Under a theoretical system that removed just non-duplication and syndicated exclusivity, there would still be mechanisms in place to preserve localism. First, compulsory license fees are lower for the retransmission of local signals than they are for distant signals.[109] Second, as the broadcasters have argued, cable customers want their local news coverage.[110] That means that cable companies would prefer to retransmit local broadcasts and would likely pay a higher price to their local broadcaster than they would to carry a distant broadcasters' signal. They would resort to seeking out distant broadcasters only if they were at an impasse with their local broadcasters.

[108] 17 U.S.C. § 119(a)(2)(B).
[109] Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, 2005 WL 2206070, ¶ 33 (FCC) (September 8, 2005).
[110] *See NAB Comments, supra* note 99, at 4.

This system would help drive down retransmission consent fees and wouldn't allow local broadcasters to threaten blackouts if an agreement couldn't be reached.

The Network/Broadcast Affiliate Relationship

Broadcasters, however, have argued that, because of the contracts in place between the broadcasters and the networks, simply removing network non-duplication and syndicated exclusivity rules would have no actual impact. Contracts between broadcasters and networks often contain "exclusivity of territory" clauses, which give broadcasters the rights to have their signals retransmitted only in a limited geographical area. These clauses could prevent broadcasters from competing with one another in the event that the network non-duplication and syndicated exclusivity rules were removed.

More fundamentally, affiliated broadcasters fear irrelevance if the compulsory license and must-carry/retransmission regime were scrapped altogether. But, as noted, this scheme artificially and substantially constrains the range of contract options between networks and affiliates, leaving essentially only the current, ham-handed system for managing transfer payments between networks and affiliates. Retransmission consent fees are the only means networks have of propping up affiliate broadcaster distribution of content only because the rules require it, not because it is the optimal system.

But if the networks truly value the local broadcasters as much as they claim, in a deregulated system they wouldn't let the broadcasters suffer serious financial harm. Instead, the networks and broadcasters would simply re-negotiate the contracts between one another to give the broadcasters a cut of the copyright proceeds. Or they may continue to assign their affiliates territorial, exclusive licenses, thereby enabling them to continue dealing directly with MVPDs, with payment from the affiliates traveling back up the chain. Or they may create some other form of contract. The point is, there is nothing sacrosanct about the current system that finances local programming through both advertising and retransmission fees, and, in principle, any of a number of contractual arrangements between networks and their local broadcast affiliates to redistribute copyright license fees could support local programming.

The broadcasters have also claimed that eliminating the retransmission consent scheme would mean the end of local news coverage.[111] But if MVPD customers want local news coverage, MVPDs will find a way to make it available to their customers, networks will facilitate it, and local broadcasters will receive copyright royalties for such locally created content. That may mean finding an outlet for their content online, either through OVDs or by offering it directly to

[111] *NAB Comments*, *supra* note 99, at 6.

consumers online—or perhaps in partnership with 4G broadcasters. The broadcasting model may be born anew—if only the spectrum currently used innovative wireless services, such as 4G Broadcasting.[112]

These arguments that the broadcasters have put forth show that they see the writing on the wall: that broadcast is becoming an irrelevant medium. But eliminating retransmission consent and all of its components doesn't directly spell the end for broadcasters. It merely lets the networks and the public determine if there's truly a demand for them, and it enables the market price for this demand to be determined unencumbered instead of by the artificial retransmission consent regime. And if there is a need, broadcasters will survive. But if it turns out that the demand for what broadcasters deliver is no longer there, isn't that a sign that broadcasters simply are necessary anymore? Technological progress is bound to make certain older technologies unnecessary. If the modern video marketplace determines that broadcasting falls into this category, why should consumers continue to subsidize it if it's longer needed? Why shouldn't local programming, like news and sports, be distributed over the Internet?

Regardless of whether broadcasting as a medium—as distinct from broadcasters as local programmers who could use MVPDs or the Internet for retransmission—is necessary in today's video marketplace, broadcasters have adduced two additional legitimate concerns about eliminating the current legal regime. They are correct that it would lead to a period of uncertainty as MVPDs, broadcasters and networks attempt to navigate the new regulatory landscape to determine the best way to do business with one another. And they are also correct that there are currently long-term contracts in place, negotiated under the old regulations that would be interfered with if the regulations change. But these are not reasons in and of themselves to keep the compulsory license scheme in place. Because of the long-term contracts, customers are unlikely to be affected by a transition and likely won't lose access to content. And these contracts can be modified over time to deal with the new reality and likely won't have the drastic impact that the broadcasters claim; after all, affiliate contracts are often regularly renegotiated anyway. And networks, MVPDs, and especially broadcasters will to have to adjust to the realities of competition from OVDs eventually.

All of this is contingent, of course, on the compulsory license, must-carry and their statutory brethren never being applied to OVDs at all. The debate over whether to eliminate retransmission consent for MVPDs has already been raging for years, and there seems to be an acknowledgement from all parties that it will eventually disappear . Applying this antiquated and artificial method of acquiring access to network content makes little sense today for MVPDs, and applying it to OVDs could severely damage a growing industry that needs as few regulatory barriers as possible to

[112] *See supra* at 48.

thrive and compete with incumbent video providers. OVDs are already blazing their own path for acquiring rights to content, and they are doing just fine without compulsory licenses and the Communications Act's carriage regime. Their model is actually giving us hints of what the future might look like when retransmission consent finally goes away—replaced by a regime based on copyrights and policed by antitrust.

We don't exactly what the video marketplace will look like following the elimination of compulsory licenses and the retransmission consent regime. Even some MVPDs have stayed out of the retrans fight, preferring the devil they know to the one they don't. And broadcasters are loathe to give up guaranteed revenue in exchange for unknown contractual alternatives. But that doesn't mean that the system serves the public interest anymore.

Finally, while broadcasters adamantly defend their right to receive payment via compulsory license and retransmission consent for licensing television content, they nevertheless just as adamantly oppose the creation of a compulsory license for radio broadcasts.[113] The difference, of course, is that, whereas the Cable Act amendments to the Copyright Act preserved the underlying performance right for video (subject to the compulsory license), the performance right for sound recordings does not extend to cover broadcast public performances.[114] Broadcasters are net recipients of retransmission consent fees for television broadcasts through operation of the Byzantine carriage rules and established contracts with networks, but the same revenue sharing arrangement would not exist for radio and broadcasters presume they would instead be net payors of a compulsory radio performance right. It is disingenuous to argue that the one system serves the public interest while the other would imperil it when the primary difference between them is merely the distribution of revenue among the relevant players.

Aereo and Copyright

The discussion of the future of the video marketplace in a post-retransmission consent world is premised on one significant assumption: that the 2nd Circuit's recent decision in the *Aereo* case[115] does not remain the law of the land. Why? Because the *Aereo* decision potentially changes everything.

Aereo is an online video provider with a unique service: for $8 per month, the company "leases" to each subscriber a remote television antenna, located at an Aereo data center, that enables

[113] *A Performance Tax Puts Local Jobs at Risk*, NATIONAL ASSOCIATION OF BROADCASTERS (2013), http://www.nab.org/advocacy/issue.asp?id=1889 (last visited June 11, 2013)
[114] *See, e.g.*, Paul Maloney, *Copyright chief Pallante renews priority for "full sound recording performance right," aka on-air radio royalty*, RADIO AND INTERNET NEWSLETTER (June 6, 2013), http://kurthanson.com/news/copyright-chief-pallante-renews-priority-full-sound-recording-performance-right-aka-air-radio-r.
[115] *WNET v. Aereo*, Docket Nos. 12-2786-cv, 12-2807-cv, (2d Cir. 2013).

subscribers to watch broadcast programming on Internet-connected devices.[116] Subscribers may also record broadcast transmissions on Aereo servers and access those programs at any time (much like a DVR). According to the Second Circuit, because Aereo is not a cable provider, it is not subject to the Copyright Act's performance right and thus does not have to get consent from or pay broadcasters for the retransmission of broadcast signals.[117]

The Second Circuit found that, because Aereo customers are capturing their programming through individual antennas, and because their servers keep a unique recording for every customer who records a program, their rebroadcast of content is not a "public performance" under copyright law.[118] The decision is rooted in the Second Circuit's 2008 *Cablevision* decision, holding that Cablevision's remote storage DVR (which enables subscribers to record programs on servers hosted by Cablevision at remote locations) did not violate copyright laws.[119] Aereo merely built a technological Rube Goldberg Machine to mirror the Rube-Goldberg-like nature of current law.

So Aereo can now legally retransmit broadcast signals to its customers with zero content acquisition costs, and reap the profits. It doesn't have to pay broadcasters, but more fundamentally, it doesn't have to pay copyright holders. And now other OVDs can attempt to emulate Aereo's business model and also avoid having to pay for access to broadcast content.

Broadcasters have decried the decision, and the networks have even threatened to take their content off the air and become MVPD channels in response.[120] They have good reason to be upset: The *Aereo* decision could drive the best programming off of broadcasting and onto networks carried only by MVPDs. Otherwise, the trend to cord-cutting may accelerate, as OVDs like Aereo (and larger OVDs using Aereo's technology) begin to offer broadcast programming. Either way, the decision may financially threaten the viability of broadcasting by reducing or even eliminating both the revenue broadcasters receive from MVPDs for retransmission and the ad revenue they earn by showing content that shifts to MVPD networks like the still-hypothetical "Fox Channel." This could ultimately put the broadcasters out of business. But most importantly, it undermines content owners legitimate copyright interest in performance of their works in contravention of the spirit, if not the letter, of the Copyright Act.

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[116] Larry Downes, *Aereo TV: Barely Legal By Design*, *Harvard Business Review Blog*, (March 7, 2013), http://blogs.hbr.org/cs/2013/03/aereo_tv_barely_legal_by_desig.html.
[117] *WNET v. Aereo*, at 2.
[118] Id. at 5.
[119] *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).
[120] Andy Fixmer, *News Corp. to Take Fox off Air if Court Backs Aereo*, *Bloomberg* (April 9, 2013), http://www.bloomberg.com/news/2013-04-08/news-corp-says-it-will-take-fox-off-air-if-courts-ok-aereo-1-.html.

The Second Circuit's decision could still be overturned by the Supreme Court if four Justices decide to hear the case. And at least one other court has already found that the Second Circuit's interpretation of the Act is incorrect, holding (appropriately, I believe) that Aereo's system fits clearly within the Act's meaning.[121] The real issue is that the exclusion of as system like Aereo's was clearly not intended by Congress, and the holding exists perhaps only because the public performance right language was poorly worded. Congress could and should act to revise the statute and make its intent clear by codifying an exclusive "right to make available" for broadcasts.[122]

If the decision stands and Congress doesn't overrule it, we could see the rise of OVDs and the demise of the broadcasters happen more quickly than expected. One of the biggest problems with the decision is that it sets a clear dividing line between MVPDs, who still have to abide by retransmission consent for access to broadcast content, and OVDs, who suddenly have a way to deliver broadcast content for free.

Whether *Aereo* stands or not, its awkward outcome is an example of the unintended consequences of the cobbled together copyright and carriage regimes regulating MVPDs.

Vertical Integration

Many industry critics are concerned about the extent of vertical integration between content and distribution, and myriad existing rules and proposals for additional restrictions are animated by professed concerns about vertical integration. Other rules and proposals involve related issues (similar to those discussed above) around the regulation of the relationship between content and distribution. These concern, among other things, program access rules, program carriage rules, unbundling and tiered pricing.

Background

We have some experience with how rules prohibiting integration of video content producers and distributors play out, and our economic understanding of the issue is well developed. The Supreme Court's 1948 *Paramount*[123] decision ended the system of studio ownership and control of theaters, then the only significant distribution outlet for films, and restrained their ability to bundle content

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[121] *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, CV 12-6921-GW JCX, 2012 WL 6784498 (C.D. Cal. Dec. 27, 2012) (enjoining Aereo-like service upon finding plaintiffs would likely prevail in claiming the service infringed on the public performance right). *See also WNET v. Aereo*, Docket Nos. 12-2786-cv, 12-2807-cv, (2d Cir. 2013), Chin, C.J., dissenting.

[122] *See, e.g., New paper examines distribution and 'making available,' Copyrights & Campaigns*, http://copyrightsandcampaigns.blogspot.com/2010/09/new-paper-examines-distribution-and.html

[123] *See United States v. Paramount Pictures*, 334 U.S. 131 (1948) (landmark case restricting block-booking and forcing major movie studios to divest themselves of their movie theater chains).

in contracts with distributors. But far from serving consumer interests, the decision led to a marked decrease in the quantity of content. The most "noticeable trend is from 1950 to 1955, when output share from the seven majors, excluding United Artists, fell by nearly 30 percent. After 1951, the year by which all studios had spun off their theatre holdings, output of the major studios dropped significantly and rental rates rose accordingly. Although this reaction had beneficial results for the independent producers, the increase in rental prices severely worsened the plight of exhibitors" and consumers.[124]

Transaction costs explain this reduction in consumer welfare. As with bundling, vertical integration reduced both *ex ante* costs from negotiation and *ex post* costs from monitoring. As studios lost control over distribution, they "became more uncertain about revenues, [and] their discount rates went up... Thus, transaction cost increases meant supply contracted, which led to market excess demand and rising rental rates."[125] Essentially, the studios could only afford to produce the most profitable content, thus curtailing the quantity of content produced. One should not overlook, though, that this period also coincided with the expansion of television into the American home, which dramatically altered the video distribution landscape.

Similarly, transaction costs in the cable market are high because licensing is inherently complicated.[126] The process of licensing the MGM library presents a tangible example of this largely unseen complexity. The sticker price of the revenue from licensing rights to content, content which is already in existence and fully completed, is a misleading figure,

> [A]s it had to be split with others who had rights in the titles. Each title had its own contractual terms governing payments to partners, talent, guilds, and third parties. Just making these payments entailed issuing more than 15,000 checks per quarter. Not only did titles have different pay-out requisites, but their future revenue stream depended on factors specific to each movie, such as the age of its stars, its

[124] Gregory M. Silver, *Economic Effects of Vertical Disintegration: The American Motion Picture Industry, 1945 to 1955* 16-17 (London School of Economics Working Paper No. 149/10) ("This sharp drop in output illustrates one of the most interesting ironies of Paramount: that many of the typical characteristics of a restrained market became more apparent in the industrial organisation after divorcement than before it. M.A. Adelman, a prominent MIT economist of the 1950s stated that the signs of a controlled market 'are not size, or agreement, but restricted output, higher prices, and excess capacity.'").
[125] *Id.* at 19.
[126] Gregory L. Rosston, "An Economic Analysis of Competitive Benefits from the Comcast-NBCU Transaction," *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal Inc. For Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56, at 8 (May 4, 2010), *available at http://www.comcast.com/nbcutransaction/pdfs/ROSSTON%20-%20Public%20Version%20Stamp%20In.pdf* [hereinafter Rosston, *Economic Analysis*] ("There are many issues to resolve and agree upon, including the ability of the content provider to determine the amount and type of content that will be made available under certain conditions, the level of restrictions on licensing content to other distributors and for other services, most favored nation ('MFN') clauses, required marketing efforts by the parties, rights over the sale of advertising, release timing for programming, quality of programing, and many other factors.").

> topicality, and its genre. To evaluate the library, Viacom [a prospective licensee] assigned a team of fifty of its most experienced specialists to evaluate how much each and every title would bring on over a decade. The Herculean job took the team two months.[127]

Reduced transactions costs, a benefit of vertical integration and bundling, are very likely to facilitate an increase in the sort of high-value programming that consumers desire. A drama with high production-value or a documentary that requires extensive research is expensive to create and, therefore, becomes more risky as the licensing becomes less certain. A vertically integrated firm can reduce that risk by increasing the certainty of licensing, making the production and distribution of that content more likely as well as cheaper.[128] If regulators impose restrictions on vertical integration in cable, similar to those in Paramount, we should expect similar results: reduced quantity and increased price.

Another reason an MVPD operator may want to own content is to reduce the costs of obtaining it. Program networks generally charge MVPDs license fees on a per-subscriber, per-month basis. But and MVPD can eliminate these costs by owning the channel.[129] This pro-competitive effect is called the elimination of double marginalization, and it often leads to lower prices for consumers.[130] Double-marginalization can be found when licensing films for distribution, either in theaters or on television:

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[127] Edward Jay Epstein, *Hollywood Economist 2.0* § 865 (2d ed. 2012).
[128] Rosston, *Economic Analysis*, *supra* note 126, at 10 ("Developing such new platforms requires risky, business-specific investment...Comcast has incurred significant upfront and ongoing expenditures for its new distribution platforms...However, expenditures such as these may be profitable only if sufficient content is available now and in the future at arm's length terms without protracted delay. While Comcast has made significant investments in developing new delivery platforms, it will have a greater incentive to make these investments (and make them sooner) when it expects to have more efficient access to sufficient quality and variety of content...Content providers, however, also need to ensure that new revenue streams will provide the financial support necessary to justify the large investments that are required to create high-quality, professionally produced programming before they risk undercutting established revenue streams by allowing their content to be delivered over new distribution platforms."); *See also* Gregory L. Rosston & Michael D. Topper, "Response to Comments and Petitions Regarding Competitive Benefits and Advertising Competition," *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal Inc. For Consent to Assign Licenses or Transfer Control of Licensees,* MB Docket No. 10-56, at 2 (July 21,2010), *available at* http://www.comcast.com/nbcutransaction/pdfs/REDACTED%20Rosston-Topper%20Reply%20Report%20-%20FINAL.pdf [hereinafter Rosston, *Response*] ("Comcast's track record demonstrates that it significantly increases programming investments in its networks that it controls.").
[129] Thomas W. Hazlett, *Vertical Integration in Cable Television: The FCC Evidence* 5 (Oct. 19, 2007) *available at* http://www.arlingtoneconomics.com/studies/vertical-integration-in-cable-television.pdf ("Firms that create or purchase inputs would be expected to employ these internal assets over external purchases, given transactional efficiencies available. In cable TV, for instance, program networks routinely charge cable operators license fees on a per-subscriber, per-month basis. These charges result in each additional subscriber costing more to the operator. Such marginal costs can be eliminated, however, by owning the channel.").
[130] Rosston, *Response*, *supra* note 128 ("the reduction in double marginalization...is based on empirical evidence").

> Along the metaphoric road of getting movies to the greater public, the studios act as the toll collector. The major studios collect this toll in the form of a distribution fee not only on the movies that they produce and finance but on other people's movies that they distribute. No matter how well or badly a movie fares at the box office, no matter how much money outside investors have sunk into it, the studio takes its cut from the gross emanating from the box office, the video store, and the television stations."[131]

The myopic focus on MVPDs' carriage decisions misses the larger questions about incentives for greater content production and whether new content can reach consumers. And importantly, this is true not only for affiliated content, but for independent programming, as well.

A rule mandating the separation of content and distribution could lead to fewer opportunities for independent programmers to reach audiences because it could reduce incentives for MVPDs to invest in infrastructure, thus reducing the incentive to invest in valuable content that relies on distribution. The decision to increase infrastructure also benefits other content owners. These investments are what lead to expanded channel capacity in the first place.[132] One scholar described this process as a virtuous circle:

> [C]able TV systems invest in program networks [and] they simultaneously invest in complementary assets... Better content improves the value of distribution conduits, just as improved transport facilities make cable programming more valuable. Hence, if cable operators see profits available from creating new programming, they enjoy incentives to build additional capacity (adding channel slots to cable infrastructure) in order to realize those returns. Given economies of scale and scope in capacity upgrades, an operator expanding its distribution network for some of its own programming can simultaneously add capacity to deliver much more."[133]

While integrated distributors might have an incentive to withhold access to their affiliated content from competing MVPDs, as discussed below, this fear may be overstated, and most discussions of the issue (in significant part because the rules requires it) fail to look at the broader economic consequences of dealing with this potential problem through mandated carriage.

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[131] Hollywood Economist 2.0, § 1055.

[132] Hazlett, *supra* note 129 at 9 ("Again, any evidence of favoritism exhibited by cable TV operators towards their own programming must be evaluated in the light of these market outcomes. Even where favoritism may exist, and cannot be explained by production or transaction cost efficiencies, dynamic efficiencies may well result. These occur where operators, partly in response to economic incentives offered by the lack of regulation, undertake to expand channel capacity. As seen currently, the dominant share of the capacity created by cable operators is allocated to unaffiliated program networks. Hence, the net effect of the incentives in place is to facilitate entry by non-MSO basic cable channels.").

[133] *Id.* at 6.

In a related fashion, vertical integration can be pro-competitive by increasing incentives for innovation. The evidence suggests that when a company is vertically integrated, it is easier to bring innovative products to market more quickly. Comcast's development is informative:

> [H]istorical adoption patterns of video on demand (VOD), DVD day-and-date release, Fancast Xfinity TV, and advanced advertising demonstrate that the launch and expansion of these products took longer than expected or necessary because of limits on the quantity, quality, and variety of content that was available to Comcast. There is no claim that the launch and delivery of new offerings was possible without vertical integration; rather, the critical point is that vertical integration can accelerate the launch and expansion of new products, services, and platforms, and increase experimentation."[134]

Vertical integration with NBCU, as well as exclusive contracts and other contract restrictions, allows MVPDs to bring innovative products like these to the market much more quickly because of reduced concern about risk.[135]

Furthermore, vertical integration overcomes disparate marketing incentives between content owners and distributors, ensuring that not only access to content, but also information about content is made optimally available to consumers.[136]

Ever-increasing competition in the distribution market also ensures that consumers are protected. Now, more than ever, it is possible for programming to be freed from dealing with limited distribution options. There is little reason that networks and other content owners must rely on cable or DBS for distribution, even in markets with only a single MVPD. Where there is more than one MVPD, networks (and consumers) can choose among them. But if the content owner does not

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[134] Rosston, *Response*, *supra* note 128, at 9 ("In fact, DirecTV's example of Comcast gaining access to Sony/MGM content demonstrates this point...Comcast was unable to use contractual means along to overcome these frictions and had to participate in Sony's purchase of MGM to reach an agreement for VOD rights to Sony and MGM content. This access to content allowed Comcast to create 'Free Movies' category on VOD.").

[135] NBC Universal, *Response to Competition Commission Statement of Issues relating to the Movies on Pay TV Market Investigation* ¶4.2, http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2010/movies_on_pay_tv/pdf/universal_response_to_issues_statement.pdf (last visited June 9, 2013) ("The current exclusive supply arrangements are usual and typical in other geographic markets, and considered by NBC Universal to be the most efficient way to optimise returns and protect the value of content to customers and consumers in subsequent windows, which is particularly important given the significant financial investments and risks involved in movie production. Any change to the nature of these arrangements, even if it were possible, would create uncertainty and threaten to jeopardise the number and quality of films produced by NBC Universal.").

[136] *See, e.g.*, Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free-Riding*, FTC Hearings on RPM (2009), *available at* http://www.ftc.gov/opp/workshops/rpm/docs/bklein0217.pdf

find the prices for distribution appealing, it can use other distribution outlets, including self-distribution online and online distribution through OVDs like Hulu, Netflix and YouTube.[137]

Fears about the death of "independent" programming absent regulation mandating dis-integration or carriage are also unconvincing. As noted above, independent producers may be net beneficiaries of the economic consequences of vertical integration. But perhaps more important, it is unclear what critics mean by "independent." If independent means "not affiliated with a distribution network," this amounts to a preference for ABC's "The Bachelor" (owned by Disney) over NBC's "The Biggest Loser" (owned by Comcast). If it means "not affiliated with a network," this amounts to a preference for "Wheel of Fortune" (started by Merv Griffin) over CBS's "The Price is Right." Both "The Voice" on NBC and "Survivor" on CBS were developed by the same independent producer – Mark Burnett. It seems extremely unlikely that Comcast would refuse to distribute "Survivor," or forego the licensing fees and withhold "The Voice" from competing distributors, not least because independent program developers like Burnett wouldn't tolerate reduced revenues. The complex incentives of the marketplace makes it impossible to draw simplistic lines between affiliated and independent content. As more and more popular programming is successfully produced and distributed outside of the usual channels (i.e., on non-network channels and by and through OVDs like Netflix and Amazon), this distinction is less and less relevant.

Finally, it is important to note that discussions of possible efficiencies from vertical integration are not purely academic. Consumers receive a pass-through rate of approximately 50% once the reduced price and increased investment in product and infrastructure are taken into account.[138] In his analysis of the 2002 AT&T-Comcast transaction, Professor Howard Shelanski, currently Director of the Bureau of Economics at the Federal Trade Commission and a former Chief Economist at the FCC stated:

> The case for pass-through efficiencies is compelling for a firm that faces competition, particularly competition as vigorous at that in the MVPD market...Reductions of the direct costs of procuring programs will result in both a lower cost per-program for subscribers and in an increased number of programs being made available to subscribers...Efficiency gains from the merger may also be

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[137] The FCC's definition of an Online Video Distributor (OVD) in the *Fourteenth Video Competition Report* includes programmers and content producers/owners (Hulu), affiliates of online services (YouTube), and affiliates of manufacturers, retailers, and other businesses (Netflix). *Fourteenth Video Competition Report, supra* note 2, at 3 n.6.

[138] Rosston, *Response, supra* note 128, at 17. Pass through may be as high as 90%, in fact. See Ex Parte of News Corp., General Motors Corp., and Hughes Electronics *Corp., Application of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control,* MB Docket No. 03-124 (Sept. 8, 2003) ("CRA Second Expert Report"), nn.41- 43, Table 1.

passed through to consumers in a less direct way through increased investment in network upgrades and the development and deployment of innovative services."[139]

Program Carriage

I agree with Public Knowledge's John Bergmayer, who testified before the Senate Commerce Committee earlier this year that:

> [T]here are some rules on the books today that seem designed to prop up legacy business models and have long outlived any functions they may once have served. Many of them can and should be repealed today. Examples of these include sports blackout rules, network non-duplication, and syndicated exclusivity provisions, and the previously mentioned basic tier buy-through rule that requires that all cable subscribers pay for free over-the-air television.[140]

Bergmayer goes on to defend program carriage (as well as program access) rules. But the same competition that undermines the relevance of the rules mentioned above also already "protects independent programmers from the negative effects of bottleneck control by some MVPDs, . . . ensuring that viewers can enjoy content from diverse sources." One can hardly conceive of an environment with more product diversity than cable, DBS and OVD programming. And the same market forces that led not only unaffiliated Disney, but also Comcast's NBCU to enter into comprehensive, cross-platform carriage agreements with multiple distributors make clear that content owners and platforms alike, whether independent or not, have strong incentives to distribute content as widely as possible.

Perhaps more important, we should question the implicit assumption - or aspiration - that all content in a competitive market should essentially be available from all distribution channels. Such a demand does not serve consumers and does not reflect economic realities. The incentive to develop innovative distribution channels and content and to invest in infrastructure improvements depends on the ability to differentiate products and to earn significant returns on such investments. Far from being an indicator of market failure, the availability of exclusive arrangements and differential treatment of content among distribution channels facilitates the very dynamism that has caused this market to thrive.

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[139] Mark Israel and Michael L. Katz, "The Comcast/NBCU Transaction and Online Video Distribution," *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal Inc. For Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56 (May 4, 2010), *available at* http://ecfsdocs.fcc.gov/filings/2010/05/04/6015593666.html

[140] *Public Knowledge, State of Video Testimony*, supra note 1, at 13.

Pursuant to Section 616 of Communications Act,[141] the Commission adopted § 76.1301(c), which states:

> No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

To prove a violation of the Commission's Program Carriage rules, a complaining programmer must show: (1) that the MVPD discriminated against a programming vendor in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation; and (2) that the effect of such discrimination unreasonably restrained the ability of the programming vendor to compete fairly.

Section 616 does not track the anticompetitive foreclosure test of the essential facilities doctrine of antitrust, where "the indispensable requirement for invoking the doctrine is the unavailability of access to the 'essential facilities."[142] As the Supreme Court noted in *Trinko*, mandatory access "serves no purpose" when the input in question is otherwise available through other channels.[143] As interpreted by the FCC, Section 616 is in fact a more expansive restriction on vertical integration abuses and likely a step away from the careful economic analysis done by antitrust authorities and courts. In other words, the FCC's interpretation of Section 616 likely restricts pro-competitive activity and represents an overregulation of vertical integration.

The recent *Tennis Channel* decision at the Commission (even more recently struck down by the D.C. Circuit) was reviewed under this provision.[144] In *Tennis Channel v. Comcast Cable*, the FCC upheld the ALJ's determination that the Tennis Channel was similarly situated to the Golf Channel and Versus (Comcast holdings) and that the placement of the Tennis Channel on a lower-penetrating tier was unfair discrimination based upon channel affiliation.[145] Relying heavily upon Hal Singer's economic analysis,[146] the FCC found the channels to be similarly situated based on their all having sports programming, the same target audiences and advertisers and similar ratings. The FCC also agreed with the ALJ that Comcast treated the Tennis Channel differently than the Golf Channel and

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[141] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); *see also* 47 U.S.C. § 536.
[142] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004).
[143] *Id. See also* Daniel F. Spulber & Christopher S. Yoo, *Mandating Access to Telecom and the Internet: The Hidden Side of Trinko*, 107 COLUM. L. REV.1822–1907 *(2007)*, *available at* SSRN: http://ssrn.com/abstract=978534.
[144] *Comcast Cable Commc'ns, LLC v. F.C.C.*, 12-1337, 2013 WL 2302737 (D.C. Cir. May 28, 2013).
[145] Memorandum Opinion and Order, *in re The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-78A1.pdf.
[146] Declaration of Hal J. Singer, *In re The Tennis Channel, Inc. v. Comcast Cable Commc'ns, available at* http://www.naviganteconomics.com/docs/Singer%20Declaration%20(Redacted,%20final)%201.4.10.pdf.

Versus because of affiliation status, rejecting all of Comcast's proffered reasons for differential treatment.[147] Comcast appealed the FCC's order, and the FCC's ruling was overruled by the D.C. Circuit Court of Appeals, where a three judge panel unanimously held that the FCC had not met its factual burden under the statute.

Despite the FCC's ruling, and as confirmed by the court, it is not clear that Comcast moved the Tennis Channel to a less-penetrated tier for anticompetitive reasons. As noted in Commissioner McDowell and Commissioner Pai's dissent, the placement of the Tennis Channel on a less penetrated tier was within industry mainstream practices.[148] The channel is one of the less-watched sports channels – one of those bundled channels that supporters of the Program Access rules elsewhere complain that competitors and consumers of Comcast must accept in order to get more valuable content. Comcast's decision to place it on a lower-penetrating tier could have been pro-competitive if the money saved by Comcast were passed on to consumers in the form of lower cable bills or investment in better content or other innovation.

And it is not clear that the lower placement was inconsistent with viewer preferences. Generally, allowing distributors to make channel placement choices in their best interests will coincide with the interests of consumers; if it did not, the consumers would switch providers or access content in an alternative way. This is the essential point about the structural nature of today's video market: consumers have a variety of MVPD choices and, critically, can get most of the content they want from OVDs, either instead of an MVPD subscription (cord-cutting) or in addition to it (cord-trimming).

While some scholars have suggested extending the FCC's Section 616 jurisdiction to other platforms, including broadband access providers,[149] there is no justification for extending the provision, already more restrictive than even the essential facilities doctrine, beyond that doctrine's "outer-boundaries"[150] of antitrust law. Put simply, while mandated access may have made sense in the cable industry once, it no longer does. The law should not restrict economic activity that is far more likely pro-competitive than not.

But Section 616 suffers from a more fundamental problem. Because it focuses solely on competitors and not competition, and, because, with only a limited exception discussed below, it proscribes conduct without consideration of economic effect, it is inconsistent with a sensible

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[147] Memorandum Opinion and Order, *see supra* note 145, at 26-31.
[148] Robert McDowell & Ajit Pai, FCC Commissioners, Joint Dissenting Statement *in re The Tennis Channel v. Comcast Cable Communications*, File No. CSR-8258-P, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-78A2.pdf.
[149] *See* Robert Hahn & Hal Singer, *Is the US Government's Internet Policy Broken?: A Review of Captive Audience by Susan Crawford, available at* http://www.gcbpp.org/files/EPV/EPV_HahnInternetBroken_12013.pdf.
[150] *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. at 399 (2004).

consumer welfare standard. (It also raises First Amendment problems, as noted by Judge Kavanaugh's *Tennis Channel* concurrence.[151])

The problem is that, even though the Commission's interpretation of Section 616 forbids only carriage decisions motivated by discriminatory intent, *discrimination*, without demonstrable anticompetitive harm, shouldn't be proscribed at all. The court in the Tennis Channel case noted that:

> There is also no dispute that the statute prohibits only discrimination *based on* affiliation. Thus, if the MVPD treats vendors differently based on a reasonable business purpose (obviously excluding any purpose to illegitimately hobble the competition from Tennis), there is no violation. . . . In contrast with the detailed, concrete explanation of Comcast's additional costs under the proposed tier change, Tennis showed no corresponding benefits that would accrue to Comcast by its accepting the change.[152]

But in a competitive content market with uncertain investments, high fixed costs and extreme product differentiation, there is no reason why discrimination against competing content shouldn't itself be considered a valid business decision.

In his concurring opinion, Judge Kavanaugh makes a stronger case for reversing the FCC, pointing out that, by his reading, the limitation on discriminatory carriage decisions was intended to be less rigid and to encompass antitrust standards:

> I write separately to point out that the FCC also erred in a more fundamental way. Section 616's use of the phrase "unreasonably restrain" – an antitrust term of art – establishes that the statute applies only to discrimination that amounts to an unreasonable restraint under antitrust law. Vertical integration and vertical contracts – for example, between a video programming distributor and a video programming network – become potentially problematic under antitrust law only when a company has market power in the relevant market. It follows that Section 616 applies only when a video programming distributor possesses market power. But Comcast does not have market power in the national video programming distribution market, the relevant market analyzed by the FCC in this case.[153]

While Judge Kavanaugh makes an important statutory interpretation point, the underlying rationale for limiting the prohibition of contracts to cases where anticompetitive foreclosure can be proven

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[151] *See Comcast Cable Commc'ns, LLC v. FCC*, No. 12-1337, 2013 WL 2302737, at *6 (May 28, 2013) (Kavanaugh, J., concurring); *see also infra* p. 61.
[152] *Comcast Cable Commc'ns*, at 2.
[153] *Id.* at 5 (Kavanaugh, J., concurring).

is important. In the antitrust context *discrimination* is not *per se* illegal precisely because discrimination makes perfect business sense and presents a problem only when it leads to demonstrable anticompetitive harm.

As with bundling, this determination requires an assessment of the full range of distribution opportunities, a question that turns on a much broader economic assessment than simply whether discrimination occurred or even whether it harmed a particular competitor. The relevant question becomes whether Tennis Channel could maintain minimum viable scale but-for Comcast's actions, thus preserving competition. Given that Comcast *did not* simply refuse carriage but rather carried Tennis Channel on a programming tier with smaller penetration, and given the strong evidence that Comcast's carriage on any tier (let alone the higher-penetrating tier) was not essential to Tennis Channel's survival, this would be extremely difficult to prove.

Unfortunately, it's not clear that "unreasonably restrain" as Judge Kavanaugh interprets it gets us to this sort of foreclosure analysis. According to his concurring opinion,

> Section 616 thus does not bar vertical integration or vertical contracts that favor affiliated video programming networks, absent a showing that the video programming distributor at least has market power in the relevant market.[154]

Market power is important, but it isn't sufficient to reach the economically sensible result, and nowhere does Judge Kavanaugh explicitly discuss foreclosure analysis. Nevertheless, Judge Kavanaugh does close this section of his opinion by noting that, "[i]n sum, Section 616 targets instances of preferential program carriage that are anticompetitive under the antitrust laws."[155]

If applied consistently, this interpretation might salvage Section 616, although there is reason to doubt the FCC could actually do so, given the reading of the statute by the Commission's current majority (and its ALJ).[156] The sort of intervention in business decisions contemplated by Section 616 as interpreted by the Commission is unwarranted. Alleged vertical-integration abuses are routinely examined under current antitrust law, without the need for specific prohibitions like the

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[154] *Id.* at *10.*
[155] *Id.*
[156] The minority (the ALJ's decision in Tennis Channel was approved by the Commission on a 3-2 vote), however, has a much better take. As Commissioner Pai noted in commenting on the court's decision,
I hope that the Commission will heed the lesson of today's D.C. Circuit decision and refrain from attempting to micromanage cable operators' programming decisions. Given the current state of the video marketplace, I agree with Judge Kavanaugh that the FCC cannot tell Comcast how to exercise its editorial discretion about what networks to carry any more than the Government can tell Amazon or Politics and Prose or Barnes & Noble what books to sell...
Statement of Commissioner Ajit Pai on the D.C. Circuit's Decision in *Comcast v. FCC*, May 28, 2013, *available at* http://www.fcc.gov/document/statement-commissioner-pai-dc-circuits-decision.

FCC's program carriage rules. While the Commission's case-by-case approach to carriage complaints is helpful, the ban on discrimination is an unwarranted categorical limitation.

It is worth noting that Hal Singer, Tennis Channel's expert in the case, recently noted in criticizing the FCC's Open Internet Order that:

> A superior way to adjudicate discrimination complaints is with *ex post*, case-by-case review before an administrative law judge rather than through broad anticipatory rules like those embodied in the order or, at the other extreme, through potentially lengthy and costly antitrust litigation in the courts.[157]

He distinguishes the Commission's approach to carriage disputes and program access disputes (discussed below), defending them on this basis and distinguishing them from the Open Internet Order's "anticipatory" limitation on discrimination in the Internet context. But the existence of *ex post* adjudication of what amount to *per se* rules prohibiting discrimination without the economic apparatus of antitrust is no better than a outright *per se* ban. The problem is the presumption that discrimination in these contexts is problematic rather than of concern *only* when an effects-based analysis demonstrates them to be anticompetitive (a rule of reason). In this fundamental regard, the statute's prohibitions against discrimination in carriage (and access) as interpreted by the Commission are no better than the Commission's self-created rule against discrimination on the Internet.

Program Access

Program Access rules prohibit, on a case by case basis, certain exclusive contracts between cable operators and content providers that restrict the ability of other providers to carry content. The sunsetting of the outright ban on exclusive contracts for satellite providers in 2012 was a significant improvement, even if it was essentially mandated by the courts.[158] But the Commission's rationale for that decision actually applies more broadly and, particularly given the First Amendment concerns inherent in such regulation and the availability of antitrust enforcement,[159] there is no longer a basis for maintaining any of the rules constraining vertical contracting. As the Commission noted:

> We recognize that the potential for anticompetitive conduct resulting from vertical integration between cable operators and programmers remains a concern. For

[157] Litan & Singer, THE NEED FOR SPEED (2013) at p. 43.
[158] Report And Order In Mb Docket Nos. 12-68, 07-18, 05-192 Further Notice Of Proposed Rulemaking In Mb Docket No. 12-68 Order On Reconsideration In Mb Docket No. 07-29), ¶ 11 (Oct. 5, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-123A1.pdf.
[159] *See infra* at 61.

> example, in some markets, vertical integration may result in exclusive contracts between cable operators and their affiliated programmers that preclude competitors in the video distribution market from accessing critical programming needed to attract and retain subscribers and thus harm competition. While the amount of satellite-delivered, cable-affiliated programming among the most popular cable networks has declined since 2007, some of that programming may still be critical for MVPDs to compete in the video distribution market. Congress has provided the Commission with the authority to address exclusive contracts on a case-by-case basis. We thus conclude that, in the context of present market conditions, such an individualized assessment of exclusive contracts in response to complaints is a more appropriate regulatory approach than the blunt tool of a prohibition that preemptively bans all exclusive contracts between satellite-delivered, cable-affiliated programmers and cable operators.[160]

Not surprisingly, it is linear sports programming that seems to drive much of the concern around exclusivity, and the Commission made clear in its action allowing the ban on exclusive satellite programming contracts to expire that the "presumption" against exclusive contracts regarding regional sports networks applied to terrestrial cable operators remained for both satellite and terrestrial operators:

> This case-by-case consideration of exclusive contracts involving satellite-delivered, cable-affiliated programming will mirror our treatment of terrestrially delivered, cable-affiliated programming, including the establishment of a rebuttable presumption that an exclusive contract involving a cable-affiliated RSN has the purpose or effect prohibited in Section 628(b) of the Act.[161]

But an analysis of one of these arrangements will serve to illustrate the defects of the general principle that Commission regulations impeding exclusive vertical contracting are appropriate at all, even in the sports programming context.

In her book, *Captive Audience*, Susan Crawford points to Comcast's exclusive right to air Portland Trail Blazers games in the Portland market.[162] Crawford alleges that Comcast has refused to license this popular content to competing distributors and allows only Comcast subscribers to access it online – thus harming competing providers and limiting exposure for the team. Comcast, for its part, has argued that it would have licensed the programming to other MVPDs, but simply failed to come to a deal with Dish and DirecTV.

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[160] Report and Order, at ¶ 3.
[161] Report and Order, *In the Matter of Revision of the Commission's Program Access Rules*, MB Docket Nos. 12-68, 07-18, and 05-192, para. 3, *available at* http://www.fcc.gov/document/revision-commissions-program-access-rules.
[162] *See Id.* at 146, 148-49.

On its face and assuming some sort of bad faith by Comcast in its negotiations with Dish and DirecTV,[163] this sounds like unwarranted exclusive dealing, leading to consumer harm and harm to Comcast's competitors. Digging deeper, though, one can see that Comcast's 2007 deal with the Blazers – the price of which would have been considerably lower without the ability to exercise exclusivity – may have been a contributing factor in keeping afloat what had been a financially struggling franchise.[164]

Moreover, the ten-year, $120 million contract with the Blazers not only helped the team out of a tough financial situation, but it also immediately *increased* the overall television exposure of the team.[165]

> In the season before CSN-NW [Comcast's Regional Sports Network including the Portland area] launched, 21 Trail Blazers games were not televised anywhere on any outlet. Upon launch, CSN-NW significantly increased the amount of Trail Blazers-related content, including live games, available to local fans. Now, between the Trail Blazers' over-the-air partner (which telecast 15 Trail Blazers games during the 2009-10 NBA season), the package of games made available on CSN-NW, and games carried on nationally distributed networks (which telecast seven Trail Blazers games during the 2009-10 NBA season), *all* of the team's regular season games are televised. In addition, prior to the advent of CSN-NW, only about 10 Trail Blazers games were available in HD. Now, all 60 games shown on CSN-NW are available in HD.[166]

Absent the exclusive deal, it seems possible that there might have been *no* Blazers games in the Portland market – either on television or live in the Rose Garden Arena.

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[163] An unwarranted assumption in reality, however, given that Comcast licensed the content to 11 other providers and offered it to Dish and DirecTV on the same terms. Those providers decided not to carry CSN-NW, Comcast's RSN carrying Blazers games, however. *See* Comcast's Opposition to Petitions to Deny and Response to Comments, *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56 at pp. 313-14.

[164] In the years leading up to the Comcast deal in 2007, the Portland Trail Blazers were in dire economic straits. The owner, Paul Allen, was considering selling the team and there were complaints of a "broken economic model." The deal struck in 2007 provided much needed revenue and exposure for the team, which was close to bankruptcy in 2004 and put up for sale in 2006 (before the owner deciding not to sell). *See* Portland Trailblazers, WIKIPEDIA, http://en.wikipedia.org/wiki/Portland_Trail_Blazers#2003.E2.80.932006.

[165] Comcast SportsNet, *Portland Trail Blazers Announce a New Regional Sports Network* (May 21, 2007), http://www.nba.com/blazers/news/Comcast_Sports_Net_Portland_T-225869-1218.html ("During its launch season Comcast SportsNet Northwest will carry at least 55 regular season Trail Blazers games, which when combined with the Trail Blazers' over-the-air coverage, means that 81 regular season Trail Blazers games will be on television next season, the most in the team's history. Comparatively, the Trail Blazers had 61 total regular season games on television last season. Comcast SportsNet Northwest will also dramatically increase the number of Trail Blazers' games in HDTV by nearly 200%, airing 28 of 36 home games in HDTV.").

[166] Comcast's Opposition to Petitions to Deny and Response to Comments, *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56, at 315 (Jan 20, 2011).

The problem is that a theoretical FCC analysis of the deal and its exclusivity[167] would not have turned on these facts. The program access rules turn entirely on harm to competitors, not overall economic effects, despite the existence of the Communications Act's ubiquitous "public interest" standard in the provision:

> **Purpose**
> The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.
>
> **Prohibition**
> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[168]

Strangely, the statute uses *consumer protection* language ("unfair methods of competition" and "unfair or deceptive acts and practices," terms borrowed from Section 5 of the Federal Trade Commission Act[169]) as the basis for its mandate, even though it explicitly considers only the effect on competitors.

Tellingly, the statute's test for determining whether exclusive satellite contracts were in the public interest turned on these factors:

> In determining whether an exclusive contract is in the public interest for purposes of paragraph (2)(D), the Commission shall consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:
>
> > (A) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;

[167] The issue *was* raised as an objection to the Comcast-NBCU merger, where Comcast pointed out that, if it were a real issue, it could be dealt with in a program access challenge.
[168] 47 U.S.C. § 548, *available at* http://www.law.cornell.edu/uscode/text/47/548.
[169] 15 U.S.C. § 45, *available at* http://www.law.cornell.edu/uscode/text/15/45.

(B) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;
(C) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;
(D) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and
(E) the duration of the exclusive contract.[170]

None of these factors would seem to permit a consideration of overall economic effect outside the effect on competing providers.

It is hard to argue that local fans were hurt by Comcast's deal with the Blazers. The fact that the team was previously unable to license so many games points to the likelihood that there was nobody else trying to buy that content at a reasonable price. It certainly does not indicate that it is highly desired content that is now being withheld from competing distributors. But competing providers could plausibly argue harm under the statute. By focusing not on the effects of such contracts in the *content* market but only on their narrow effects on distribution, the statute may be harming, not serving, the public interest.

The purpose of the Program Access rules was to open the door for competition to cable operators in the MVPD market, and that goal has clearly been achieved. Customers have a wide variety of options to receive video content today, but 1992's rules, designed for a cable-dominated world, still regulate the industry. They force cable companies to help out their competitors in a competitive market, and improperly discriminate against cable-affiliated programming while competitors like Netflix cultivate their own original programming that faces no regulation whatsoever. Additionally, the Program Access rules today essentially bar MVPDs from competing on any basis other than price, which prevents MVPDs from implementing new business models and packages that could improve quality and ultimately lighten costs for cable and satellite subscribers.

Bundling and *a la Carte* Mandates

Bundling has nuanced effects on businesses and consumers. The practice can be pro-competitive because it allows for economies of scope in production for businesses and lower consumer search costs.[171] Programmers often bundle more popular content with less popular content to distributors. Distributors usually then sell bundles of channels to consumers. In a high fixed-cost industry like

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[170] 47 U.S.C. § 548(c)(4), *available at* http://www.law.cornell.edu/uscode/text/47/548.
[171] Bruce Kobayashi, *Does Economics Provide A Reliable Guide To Regulating Commodity Bundling By Firms? A Survey of the Economic Literature*, 1 JOURNAL OF COMPETITION LAW & ECONOMICS 707, 717 (Dec. 2005), *available at* http://www.law.gmu.edu/assets/files/publications/working_papers/05-35.pdf.

cable, bundles reduce transaction costs and these savings often outweigh the costs of providing the less-valued commodity to the consumer. For instance, the savings gained by a cable distributor in providing a basic tier of channels to the consumer is greater than the cost of providing "wasted" channels that the consumer may not watch. Further, this is not necessarily bad for the consumer. In the context of cable channels, for instance, consumers can obtain many extra channels at an overall lower price. Similarly, the bundling of Internet access with video distribution can be positive when the two can be offered at a lower combined price than the consumer values each independently.

While bundling of content is often assumed to constitute proof that the market is uncompetitive, bundling occurs not only my monopolists *but by all market participants* because it is (or tends to be) efficient, whether it is done by the content owner bundling programs into a channel or bundling channels into a licensing package, or by distributors bundling channels into tiers or bundling multiple services into a package.

Economists offer several explanations for the bundling of products, but the most likely applicable here is that bundling is an efficient way of pricing and marketing products with low marginal costs, high fixed costs, and insufficient (or unknown) demand to cover the fixed costs of the product. Ironically, understood in this fashion, both of the following may well be products of competition rather than its absence:

- The sort of bundling practiced by Viacom and complained about by Cablevision in its pending antitrust case against Viacom,[172] and
- The bundling practiced by Cablevision and complained about by every consumer who flips past hundreds of unwatched channels on their way from MTV to PBS.

With heterogeneous consumer demand being served by not only hundreds of channels but also thousands of programs bundled into each channel, there can be no doubt that the sometimes enormous fixed costs of program *production* are incurred *ex ante* with a more than reasonable risk that any given program will be met with an audience insufficient to compensate the program's developers. Infrastructure investments are similarly made under conditions of uncertainty and are similarly risky. At the time programming, infrastructure and even some marketing investments are made, the quality of, and economic return on, any particular program is unknown and highly variable. Requiring individuated and *ex post* contracting would dramatically increase the riskiness of any particular investment decision, which, by definition, must be made *ex ante* without certainty about consumer demand. The bundling of programs into channels and channels into tiers in

[172] Patricia Hurtado & Edvard Pettersson, *Cablevision Sues Viacom Claiming Antitrust Violation*, BLOOMBERG (Feb. 27 2013), http://www.bloomberg.com/news/2013-02-26/cablevision-sues-viacom-claiming-antitrust-violation.html.

contracts between both viewers and distributors and distributors and content owners helps to guarantee an overall rate of return sufficient to support the production and distribution of a wider and more varied range of programming.

Moreover, it is actually *less* expensive for MVPDs to offer a wide range of channels to all customers than it is to offer smaller, individualized bundles to each customer. Far from saddling consumers with unwanted channels for which they nevertheless have to pay, bundling likely facilitates the production and distribution of much of the programming *every* consumer watches at the price she is willing to pay for only what she watches. This dramatically expands consumer welfare. "[I]n this case bundling goods together increases demand for a product without increasing costs."[173] Even if no consumer wants every channel or every program offered on every channel, it is cheaper to provide and to negotiate over bundles of programs and channels together than it is to provide each separately. If forced to do the latter, some programming would simply not be either produced in the first place or offered in the second.

Despite these economic realities, some critics have called for mandatory unbundling, whether by statute, regulation or judicial order. Whether explicit or not, these claims are premised on the theory that bundling reduces consumer choice and thus constitutes anticompetitive conduct.

But as the Ninth Circuit held in 2012 in *Brantley v. NBC Universal*,[174] Supreme Court precedent—in particular *Leegin v. PSKS* [175] and *Hirsh v. Martindale-Hubbell* [176]—restricts, rather than authorizes, a pure "consumer choice" antitrust claim. Specifically:

> Even vertical agreements that directly prohibit retail price reductions, eliminating downward competitive pressure on price and thereby resulting in higher consumer prices ... are not unlawful absent a showing of actual anticompetitive effect. [citing *Leegin* at 888]. As *Leegin* explained, higher consumer prices can result from pro-competitive conduct. ... Had the plaintiffs succeeded in pleading an injury to competition, the complaint's allegations of reduced choice ... and increased prices would sufficiently plead the fourth element of a Section 1 claim, namely that they had been harmed by the challenged injury to competition. But here, these allegations show only that plaintiffs have been harmed as a result of the practices at issue, not that those practices are anticompetitive.[177]

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[173] David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 YALE J. ON REG. 37 (2005), *available at* http://www.justice.gov/atr/public/hearings/single_firm/comments/219224_d.htm (*citing* Yannis Bakos & Eric Brynjolfsson, *Bundling Information Goods: Pricing, Profits, and Efficiency*, 45 *Mgmt. Sci.* 1613 (Dec. 1999)).
[174] *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 573 (2012).
[175] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
[176] Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343, 1349 (9th Cir. 1982).
[177] *Brantley*, 675 F.3d at 1202 (citation omitted).

> Plaintiffs have not alleged that the contracts between Programmers and Distributors forced either Distributors or consumers to forego the purchase of other low-demand channels, . . . but only that consumers could not purchase programs a la carte and they did not want all of the channels they were required to buy from Distributors. "[C]ompelling the purchase of unwanted products" is not itself an injury to competition. [citing *Hirsh* at 1349 n. 19].[178]

Perhaps most important is the holding that, in order to demonstrate that bundling actually causes competitive harm, a plaintiff must show that the conduct *actually* reduces competition by foreclosing access to *competing* programming market-wide. The proliferation of programming, as well as distribution networks, serves to ensure that, even if bundling (and exclusive contracts, for that matter) impede access to specific programs, they don't necessarily impede access to competing programs, and not only is there no basis for *ex ante* rules prohibiting such conduct, in many cases even *ex post* antitrust complaints will and should fail.

Moreover, as the Court in Brantley correctly points out, slavish adherence to any anti-bundling principle would foreclose market activities roundly unquestioned and profoundly enjoyed:

> A rule to the contrary could cast doubt on whether musicians would be free to sell their hit singles only as a part of a full album, or writers to sell a collection of short stories. Indeed, such a rule would call into question whether Programmers and Distributors could sell cable channels at all, since such channels are themselves packages of separate television programs.[179]

Pressure for *a la carte* pricing (and antitrust restrictions on bundled program contracts between content owners and MVPDs) is borne out of the erroneous assumption that the range of choices and relative costs of programming would be the same with forced unbundling as without and the concomitant assumption that resort to a different set of specific programs constitutes harm. Unless we are prepared to bear the consumer harm from reduced variety, weakened competition and possibly even *higher* prices (and *absolutely* higher prices for some content), there is no economic justification for interfering in these business decisions.

In any case, for unbundling proposals to work, they must also include price control regulation:

> [Unbundling] rules are entirely irrelevant in the absence of rate regulation. That is because a mandate to price channels (or additional, smaller tiers) individually is

[178] *Id.* at 1203 (citation omitted).
[179] *Id.* at 1202 n.10.

> thwarted by video providers by simply pricing the new content such that customers universally opt for the "extended basic" package. Forcing cable operators to price each channel separately, but failing to cap that price, renders the constraint non-binding."[180]

But because nearly everyone recognizes that price controls are entirely indefensible, "[n]o party today makes a serious attempt to resuscitate this regulatory corpse."[181]

Data Pricing, Tiers & Online Video Distributors

As consumers increasingly turn to OVDs to either replace or supplement an MVPD subscription, the debate about the future of video marketplace is morphing into the net neutrality debate. Now that the MVPD marketplace is highly competitive, critics of cable have shifted their focus to alleging that the broadband marketplace is insufficiently competitive, allowing cable to exercise gatekeeper power to kill OVDs. Ironically, these concerns are reaching their apogee even as Google Fiber is demonstrating that broadband is *not* a natural monopoly, that a new entrant can make money building a new network *where local governments get out of the way.*

While we believe that there is much that could be done to unleash broadband competition, the current debate about foreclosing online video competition focuses on one particular issue: can MVPD-cum-ISPs keep consumers from cord-cutting or cord-trimming (to protect their MVPD service) by "capping" their monthly data allowance? More specifically, if a broadband provider, whether wireless or wireline, does not count data from its own services, or partners' services, against the cap, does this "discrimination" foreclose competition from OVDs? The right answer, analyzed under antitrust law, is: it depends. It is certainly conceivable that an antitrust case *could* be established—but probably not given the current size of the basic tier (300 gb/month on Comcast[182]) and the pricing of additional data ($10 for each additional 50 gb/month[183]) relative to consumer demand.

Concerns over data caps received their most prominent airing in the Data Cap Integrity Act, recently proposed by Senator Wyden.[184] Like the Cable Act itself, this attempt to replace antitrust principles of general application with sector-specific, prescriptive regulations isn't likely to serve

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[180] Thomas W. Hazlett, *Shedding Tiers for a la Carte? An Economic Analysis of Cable TV Pricing* 4 (2006) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=889187.
[181] *Id.*
[182] Jon Brodkin, *Comcast data caps hit test cities, range from 300GB to 600GB*, ARS TECHNICA (Sept. 18, 2012, 2:55 PM), http://arstechnica.com/business/2012/09/comcast-data-caps-hit-test-cities-range-from-300gb-to-600gb/.
[183] *Id.*
[184] Press release, Ron Wyden, *Wyden Data Cap Legislation Will Protect Consumers and Promote Innovation* (Dec. 20, 2012), *available at* http://www.wyden.senate.gov/news/press-releases/wyden-data-cap-legislation-will-protect-consumers-and-promote-innovation.

consumers well. Indeed, given the real economics of tiered pricing, the practical effects of the bill would be to impose a kind of reverse-Robin Hood form of price control for broadband.

Senator Wyden worries that "data caps" will discourage Internet use and allow "Internet providers to extract monopoly rents," quoting a New York Times editorial from July 2011 that stirred up a tempest in a teapot.[185] The bill is based on four faulty premises.

First, U.S. ISPs aren't "capping" anyone's broadband; they're experimenting with usage-based pricing—service tiers. If a consumer wants more than the basic tier, his usage isn't capped: he can always pay more for more bandwidth. But few users will actually exceed that basic tier. For example, Comcast's basic tier, 300 GB/month, is so generous that 98.5% of users will not exceed it.[186] That's enough for 130 hours of HD video each month (two full-length movies a day) or between 300 and 1000 hours of standard (compressed) video streaming.[187] And again, consumers can always buy more data—because the 300gb/month figure is just the basic tier, not a "cap."

Second, the bill sets up a false dichotomy: "Caps" (or tiers, more accurately) are, according to Senator Wyden, "appropriate if they are carefully constructed to manage network congestion," but apparently for Wyden the only alternative explanation for usage-based pricing is extraction of monopoly rents.[188] This simply isn't the case, and propagating that fallacy risks chilling investment in network infrastructure—the key to ensuring that OVDs can, in the long run, compete effectively with MVPDs. In fact, usage-based pricing allows networks to charge heavy users more, thereby recovering more costs and actually *reducing* prices for the majority of us who don't need more bandwidth than the basic data tier permits—and whose usage is effectively subsidized by those few who do. Unfortunately, the bill wouldn't allow pricing structures based on cost recovery, only network congestion. So, for example, an ISP might be allowed to price usage during times of peak congestion, but couldn't simply offer a lower price for the basic tier to light users.

That sort of intervention into business' pricing decision-making is unsupportable, from the perspective of social justice as well as basic economic rationality. Even as the FCC issued its Net Neutrality regulations (no slouch with respect to intervention in business decision-making), the agency rejected proposals to ban usage-based pricing, explaining:

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[185] Editorial, *To Cap or Not, N.Y. Times* (July 21, 2011), *available at* http://www.nytimes.com/2011/07/22/opinion/22fri2.html?_r=0.
[186] Sandvine, *2H 2012 Global Internet Phenomena Report, available at* http://techfreedom.org/sites/default/files/NCTA_Connects_Breakfast_Sandvine_Final.pdf#page=7.
[187] Daniel A. Lyons, *The Impact Of Data Caps And Other Forms Of Usage-based Pricing For Broadband Access* 9 (Mercatus Center Working Paper No. 12-27, Oct. 2012), *available at* http://mercatus.org/sites/default/files/UsagebasedPricing_Lyons_v-1_1.pdf#page=9.
[188] Ron Wyden, U.S. Senator from Oregon, Statement of Introduction for the Data Cap Integrity Act (Dec. 20, 2012), *available at* http://www.wyden.senate.gov/download/?id=e4f1badd-9148-4a9d-9710-3a1a4facd728&download=1.

> [P]rohibiting tiered or usage-based pricing and requiring all subscribers to pay the same amount for broadband service, regardless of the performance or usage of the service, would force lighter end users of the network to subsidize heavier end users. It would also foreclose practices that may appropriately align incentives to encourage efficient use of networks.[189]

Of course some cross-subsidization is inherent even in the tiers themselves, as, like bundling, it is an all-you-can-eat model for which, within any given tier, all users pay the same regardless of usage. But there is no reason to expand this subsidy beyond the range determined by providers to be most efficient.

Third and related, charging heavy users more isn't just more equitable, it's actually a solution to the very problem critics worry about: ensuring that ISPs have an incentive to encourage Internet use—rather than trying to strangle emerging OVDs in their crib. Tiered pricing means ISPs actually benefit from heavy use—even if that means the same companies suffer from increased competition as MVPDs. Data tiers help to align incentives so that, rather than try to slow use or discriminate against bandwidth-heavy applications – which is how the Net Neutrality fight started – ISPs will continue to build out faster networks.

Now, it's certainly possible that, if the basic data tier were set low enough or if additional data were expensive enough, cable companies could indeed effectively discourage their subscribers from canceling a cable subscription and switching to a competing OVD service like Netflix (cord-cutting) or simply cutting back to a more basic tier and relying partially on an OVD (cord-shaving). But it's hard to see how a 300 GB basic tier deters anyone, especially when users can buy additional blocks of 50 GB for just $10/month—enough for nearly two more hours a day of streamed video. If there actually were a problem here, antitrust law could address it far better than blunt pricing restrictions. Indeed, such an investigation is already reported to be underway.[190] And antitrust may already be operating here in the way that is most effective, but least appreciated: helping to steer ISPs to set higher thresholds for the basic data tier and lower prices for additional data than they otherwise might in a truly "unregulated" marketplace.

Finally, and most critically for the debate about OVDs, Senator Wyden's bill would require that broadband providers count content downloaded from them against the so-called "cap"—fearing that a "discriminatory" cap would harm competing video providers. But if the cap is high enough,

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[189] Federal Communications Committee, *In The Matter Of Preserving the Open Internet Broadband Industry Practices*, MB Docket No. 09-191, at 41 (2010), *available at* http://www.fcc.gov/document/preserving-open-internet-broadband-industry-practices-1.

[190] Thomas Catan & Amy Schatz, *U.S. Probes Cable for Limits on Net Video*, WALL STREET JOURNAL (Jan. 13, 2012), http://online.wsj.com/article/SB10001424052702303444204577462951166384624.html.

who cares? Under antitrust law, such "discrimination" is illegal only if it harms consumers by foreclosing competition—and it's hard to see how consumers suffer from being able to download *more* video. Would they really be better off if every hour of video they streamed from their cable company meant an hour less they could stream from Netflix? That's what Wyden's bill would require.

The recent kerfuffle over Comcast's decision in October to make some of its television (pay per view) content available through Xbox without counting against Internet usage limits brought this point into stark relief.[191] While some activists decried the decision for the same reasons as Wyden, they missed the fact that by removing some of its content from usage limits Comcast was actually freeing up users to access *more* content at lower prices.

If Wyden's concern is that usage-based pricing would allow ISPs to extract "monopoly profits" from users who bump up against tiers, then "preferencing" some of their own content will reduce, not increase, that risk: Users would be able to access, say, bandwidth-heavy video content just as they do television content now—without it counting against Internet usage limits. That this might "discriminate" against other Internet-based content providers does not mean that it harms consumers or forecloses their access to consumers—quite the opposite, in fact. Again, to the extent that it might, antitrust rules are more than sufficient to discourage such practices in the first place or punish them if they arise—*without* restricting firms' ability to price their content and manage their networks to ensure a reasonable return on their investments.

The Wyden bill appears to cover wireless as wireline networks, and indeed a similar debate is beginning in the wireless context. As mentioned above, news recently broke that Verizon and ESPN are in negotiations to offer ESPN video content to consumers without counting the data streaming against monthly data plans.[192] This news has outraged some, for the same reasons as the Xbox kerfuffle, but the consumer benefits here from such arrangements are even more clear, given the constraints on wireless capacity: Such arrangements could help make wireless an effective distribution channel for video, especially if it drives innovation in how wireless networks deliver content, whether through more effective live streaming or by pre-caching at off-peak times content a user has subscribed to (*e.g.*, the remaining episodes in a season or the next movie in a queue).[193] From a dynamic perspective, such arrangements can benefit consumers, even if they appear to be discriminatory. Antitrust law is far better equipped to evaluate such trade-offs than is any form of

[191] Larry Downes, *No, Comcast is not breaking the Internet...again*, CNET (Apr. 2, 2012), http://news.cnet.com/8301-1023_3-57407867-93/no-comcast-is-not-breaking-the-internet...again/?tag=mncol;cnetRiver.
[192] Bret Swanson, *Verizon, ESPN, And The Future Of Broadband*, FORBES (June 4, 2013, 5:10 PM), http://www.forbes.com/sites/bretswanson/2013/06/04/verizon-espn-and-the-future-of-broadband/.
[193] *See also supra* at 16.

prescriptive regulation (such as Wyden proposes) or regulations that amount to *per se* rules masquerading under the veneer of antitrust's analytical rigor.

First Amendment Challenges to Video Regulation

The transformation of the video marketplace since 1992 renders much of the Cable Act obsolete not merely as a policy matter, but probably also as a constitutional matter—despite recent, inconclusive case law on the issue. In *Turner I* (1994) and *Turner II* (1997),[194] the Supreme Court upheld special regulatory burdens imposed on cable because it found that there was a "special characteristic" of the cable medium—namely its bottleneck or gatekeeper power. But that special characteristic, if it ever existed, no longer exists today. The D.C. Circuit reached this conclusion in 2009, when it struck down the Cable Act's cap on the percentage of cable subscribers a single cable operator could reach: "Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992."[195] As Judge Kavanaugh said in his concurrence to the D.C. Circuit's recent decision in the *Tennis Channel* case:

> In today's highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market. To be sure, beyond an interest in policing anticompetitive behavior, the FCC may think it preferable simply as a communications policy matter to equalize or enhance the voices of various entertainment and sports networks such as the Tennis Channel. But as the Supreme Court stated in one of the most important sentences in First Amendment history, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).[196]

Shortly after the D.C. Circuit handed down its decision in *Comcast*, implying that it would decide *Turner* differently today, the Second Circuit rejected Cablevision's challenge to must-carry rules.[197] Cablevision objected when the FCC redrew boundaries, placing a broadcast station within the area covered by its cable system, thus allowing the broadcaster to claim must-carry rights. The court rejected Cablevision's argument that the station was too far away for the government to establish a substantial interest in promoting localism, deferring to the FCC's determination that the revised boundary would promote localism. While the court focused its analysis on the interests at stake in

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[194] *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994); *see also Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).
[195] *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009). *See also*, Brief of Amicus Curiae The Progress & Freedom Foundation in support of Petitioner Comcast Corp, *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (No. 08-1114). http://www.pff.org/issues-pubs/filings/2008/081203CableOwnershipAppellateBrief.pdf.
[196] *Comcast Cable Commc'ns, LLC v. FCC*, No. 12-1337, 2013 WL 2302737, at *11 (May 28, 2013) (Kavanaugh, J., concurring).
[197] *Cablevision v. FCC*, 570 F.3d 83 (2d. Cir. 2009).

must-carry and whether it was content-neutral (as the *Turner* Court clearly said it was), the court left the door to a future First Amendment challenge more squarely focused on the issues at stake in *Turner*:

> We think that the *Turner* cases do not foreclose the possibility of a successful as-applied First Amendment challenge to the 1992 Cable Act's market modification provisions. In this case, however, Cablevision has failed to demonstrate that the FCC applied the market modification provision unconstitutionally.[198]

Cablevision's complaint had focused on the *way* the FCC applied must-carry to it, rather than the larger principle at stake. Indeed, the Second Circuit's decision did not discuss whether must-carry discriminated among speakers and whether that discrimination could be justified because of a "special characteristic"—nor did the court mention the D.C. Circuit's decision weeks earlier in the cable cap case (*Comcast*), that no such characteristic existed.

Cablevision *did* raise this argument in its petition for cert, which the Supreme Court denied, but the denial of a cert petition does not indicate how the Supreme Court would rule on a petition that squarely presented the issue at stake in both the *Turner* decisions and the D.C. Circuit's cable cap decision. This is especially true given that Justice Sotomayor recused herself from considering the petition as a former Second Circuit Judge, making it that much harder for Cablevision to gather the four votes required for cert.[199]

So, notwithstanding the *Cablevision* case, it seems likely that the D.C. Circuit or some other Circuit, or perhaps even the Second Circuit itself (given its disclaimer about possible future challenges) could well still strike down the must-carry provisions. If some other Circuit takes this route, the Second Circuit's *Cablevision* decision simply makes it more likely that the Supreme Court would grant cert to the FCC if it loses. And the same arguments would likely apply to the Cable Act's program access provisions, which are essentially similar: both are burdens upon the editorial discretion of cable operators, uniquely among MVPDs, by reducing channel capacity, and also upon cable programmers who will have to compete for fewer channel slots. Absent a special characteristic to justify such a burden, both will be subjected to strict, rather than intermediate, scrutiny—which they are unlikely to survive.

Specialty video regulations that restrain editorial discretion (*e.g.*, by limiting available channel capacity) can be constitutionally permissible only where it is true, as it was of cable in 1994, that a video distributor has true "bottleneck, or gatekeeper, control over most (if not all) of the television

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[198] *Id.* at 95-96.
[199] Lyle Denniston, *No review of "must-carry" rule*, SCOTUSBLOG, May 17, 2010, http://www.scotusblog.com/2010/05/no-review-of-must-carry-rule/.

programming that is channeled into the subscriber's home" and can thus "prevent its subscribers from obtaining access to programming it chooses to exclude."[200] Where it is no longer true that any one medium has the ability to "silence the voice of competing speakers with a mere flick of the switch,"[201] the First Amendment requires laws of general application.

Expanding the program access rules to require that cable-affiliated programming be made available to OVDs, as Public Knowledge proposes, would be no less unconstitutional—because it does not change the analysis of *cable's* market power, or lack thereof. But in principle, a rule of general application that required all MVPDs and OVDs to make affiliated programming available to all competitors would not raise the same problems under *Turner* because it would be speaker-neutral. Thus, no special characteristic of gatekeeper power would be required to justify the rule.

Of course, such a rule will never be written because it would remove a key weapon in the arsenal of new entrants: exclusive programming. From the Sunday Ticket that helped to drive cable subscribers to DBS to Netflix's *House of Cards* today, such exclusivity is clearly pro-consumer.

Fortunately, we already have well-defined rules of general application that would avoid this absurd result, could survive First Amendment challenges, and could effectively restrain conduct that truly harm consumers: the antitrust laws.

But there's antitrust—and then there's "antitrust": the FCC's misinterpretation of the antitrust standards Congress has given it, such as Section 616 of the Cable Act. As Judge Kavanaugh's concurrence explained in the Tennis Channel case, the FCC creatively reinterpreted the statute's prohibition on "unreasonable restraints" as effectively banning "unreasonable discrimination." This was not only a misreading of the statute but also constitutionally impermissible, because it applied the statute even where an MVPD lacked market power.

Retransmission Consent and the Compulsory Retransmission License

Second, retransmission consent and the compulsory retransmission license are probably not vulnerable to the same legal challenge. The D.C. District Court upheld the retransmission consent provisions of the Cable Act in 1993, not on the "special characteristic" grounds by which the Supreme Court would, a year later, uphold must-carry, but because the court held retransmission consent was essentially similar to copyright protection and thus did not violate the First Amendment:

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200 *Id.*
201 *Turner I* at 656.

> Congress has independent constitutional authority, however, to provide creative artists – and broadcasters are arguably such – with copyright protection for their work. Congress clearly could have amended the copyright law to provide infringement remedies for cable retransmission of broadcast material. But it is not constitutionally significant that Congress has done in the Cable Act what it otherwise could have done in the Copyright Act. Whatever title of the United States Code Congress chooses to place its law in, the law is still authorized by Congress' Article I power.[202]

A First Amendment challenge to the compulsory license would likely fail for the same reason: it lies within Congress's copyright power and does not burden any particular class of speakers or advance a particular viewpoint. Of course, the fact that either may be Constitutional does not make them any more advisable as a policy matter—or any less outdated.

Conclusion

Instead of the Communications Act's outright bans on specific types of conduct that may not actually harm competition or consumers, using antitrust enforcement to govern the MVPD industry would allow the market to evolve in a natural way, with the government intervening only when actual harm to consumers can be established—and when intervention is actually likely to serve consumers. The market has evolved in ways no one could have ever foreseen 20 years ago when the Cable Act was written, and it will continue to evolve going forward in ways that we cannot predict today. Allowing the Copyright and Communications Acts' provisions to remain on the books allows the government to pick winners and losers in the future of this industry—something it is not remotely qualified to do. The Cable Act and STELA and its predecessors were written to promote competition and protect consumers, but the market has grown competitive. Government's role should be protect the copyrights of content owners and police market power through antitrust. Properly applied, antitrust is the only regulatory tool necessary—indeed, the best tool—to ensure that those with power in the MVPD industry don't use that power to harm consumers.

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[202] *Daniels Cablevision v. United States*, 835 F. Supp. 1, 12 (D.D.C. 1993).

Mr. WALDEN. Thank you very much for your testimony. We thank all the witnesses for your testimony, and will now go into our question phase.

Mr. Palkovic, in deciding whether to repeal, reauthorize, or revise the current satellite law, it is important, I think, that we understand what the impact of each of these decisions really would be on the current satellite television subscribers. How many viewers today actually receive a distant signal, because that was one of the underlying reasons for this Act—how many of those viewers would receive a local signal from their satellite provider, and how many would have no way of receiving broadcast programming over the air, over satellite, or from any other source without distant signal? So who is in that pool today?

Mr. PALKOVIC. I think the entire pool between us and DISH is roughly a million and a half customers who are receiving that. I do not have the breakdown of how many people are grandfathered. I think it is a fraction of that, maybe a couple hundred thousand, and I think those are largely on the DIRECTV side. So it is in that range. It is a small piece of the million and a half, but if we were to lose that right through this process, you would basically be taking broadcast programming not only away from the million and a half customers, but there would be absolutely no substitute for it. Because honestly, if they had a substitute, they wouldn't be paying us to get the distant signals, they would be getting it a different way.

Mr. WALDEN. OK. If we could work with you a little bit going forward just so we get an understanding what that pool looks like in terms of grandfathering, that would be terrific.

Ms. Burdick and Mr. Pyne, I am interested in helping, obviously, constituents get the programming they consider truly local. How can we ensure that they are getting programming from their state, not out of state programming, merely because they fall in a DMA assigned to another State? We obviously have that situation——

Ms. BURDICK. I am a living example of that, Mr. Chairman. I actually live in Niles, Michigan. My front yard is in Michigan and my back yard is Indiana, and I am part of the South Bend DMA, but I vote in Chairman Upton's district.

Mr. WALDEN. And you are, what, in five time zones, too? That used to be an issue.

Ms. BURDICK. We changed that a couple years ago, although my lawn mower did used to change when I go around the lawn—my cell phone would change when I go around the lawn.

At any rate, I happen to receive Comcast's Michigan signal from its Michigan head end, and what Comcast does in that case is they reserve Channel 3 for—I am a CBS affiliate in South Bend and I have network non-dup and syndicated exclusivity protections across the market, but Comcast reserves Channel 3 for the local broadcast of the CBS station in Grand Rapids, so its programming, local news, and information can be broadcast in that area.

My point of telling you that is there are ways to resolve those situations and we have resolved them in the market today.

Mr. WALDEN. I know we have that problem in Umatilla County. There is a certain former senator that is really aware of that, and anyway, it is an issue elsewhere in my district.

Ms. Tykeson, when Congress passed the '92 Cable Act and the '96 Telecom Act, cable had 98 percent and 89 percent of the pay-TV market respectively. As of 2010, cable's share dropped to 59.3 percent as I mentioned in my opening statement of the pay-TV households, and 51.6 percent of all TV households. Is there still a justification for imposing on the cable industry regulations such as must carry, basic tier, buy through, program carriage, program access, and set top box requirements?

Ms. TYKESON. Chairman Walden——

Mr. WALDEN. Go ahead and push that microphone, yes.

Ms. TYKESON. Thank you for the question. I think when we described earlier the shift in how things have changed and unfolded since 1992, it is a completely different marketplace today then it was then. Many of the rules that you have just mentioned are outdated and they need to be repealed. So my suggestion would be to consider sunsetting the '92 Act and potentially some of the other requirements in the '96 Act so there is a way to go back and revisit some of those rules. In the STELA bill, there is an opportunity for reexamination because of the sunset clause. We don't have that in the '92 Act and as a result, we are stuck with a lot of outdated rules that are harming consumers.

Mr. WALDEN. All right. Mr. Pyne, do you have any comment on that issue of these rules that are put on the cable industry? Should they stay or go?

Mr. PYNE. In terms of STELA?

Mr. WALDEN. Well no, in terms of the must carry, the basic tier, the buy through program, carriage program access, set top box programs from your perspective. We are just trying to get different perspectives here.

Mr. PYNE. In terms of the broadcast basic buy through, I think the marketplace in essence has spoken in terms of the value of local broadcast. For instance, one of the reasons satellite has shown tremendous growth over the past 12 years especially is because of their investment in satellite space to drive local into local, and it is a huge investment on their part. But clearly, it is because of the value of the local—each local broadcast community or each community in this country that has allowed their investment. So in essence, even though they did have the option to just have national programming, they actually decided as a matter of course to deliver local programming.

Ms. TYKESON. If I may just add one quick point, though.

Mr. WALDEN. Sure.

Ms. TYKESON. I think the problem now is that we have competitors in markets like Mike's company, and say, BendBroadband, that have different rules, and so the playing field isn't level. So I think we need to—for example, on the must buy, that has got to go.

Mr. WALDEN. Yes, Marci, go ahead.

Ms. BURDICK. Mr. Chairman, could I speak about must carry for just a second? I think many members of this committee have rightly been concerned about diversity. One of the values of must carry is that these are stations in a local community that are sprung up by service to that local community. Of the stations that are must carry stations today, 69 percent of them carry some religious broad-

casting. Thirty-nine percent of them carry some directed ethnic program to those communities they serve, and must carry—as a result of must carry today, networks like—channels like FOX, Univision, and others like that began as must carry stations, got traction, and then developed a business model of their own, but they are extremely important today in localism.

Mr. WALDEN. Thank you. I actually have gone like a minute 41 over my time and the committee has been indulgent, so I will now defer to the ranking member of the subcommittee, Ms. Eshoo, for 5 minutes.

Ms. ESHOO. Thank you, Mr. Chairman. I never mind listening to you, so that is fine. Thank you.

Well, the title of today's hearing is "The Satellite Television Law: Repeal, Reauthorize, or Revise?" and in some way, shape, or form each one of you have taken up one of those words, so it really fits with what the title of the hearing is. I am also mindful that, you know, as you make your recommendations to us, that these are really some huge rewrites of business plans, and those are gigantic lobbies, most frankly, around here but we are going to do our best to come up with the best, and I thank you, because we really have a mix of views which is very healthy here today.

The questions that I want to ask, and I am going to have to submit some for the record for you to respond to because I won't have enough time to ask all of them, are a little beyond, I think, just STELA, but since you are here, I still want to ask them.

Mr. Palkovic, I now understand why it is called DIRECTV, because you are very direct in your approach. In Ms. Burdick's testimony, she stated that the retransmission consent system under which local broadcast stations negotiate with pay television providers for the retransmission of their signal is working just as Congress intended. Do you agree with the assertion, and if not, what would you propose changing? Try to be as brief as possible.

Mr. PALKOVIC. Yes, I will make a quick distinction is working as intended versus working well, because I think from the broadcaster's standpoint it is working fantastic, because they have all the protection and the rights of the laws that were in place in the '92 Cable Act. What I don't think was intended is that they would go from four cable channels to 104 with regional sports networks and use the retrans process to leverage us into paying exorbitant amounts on the cable channels because we risk them blacking out channels as part of the renegotiation.

So what we want to address here is the unintended part of the combination of those laws, OK, and what is different today than in 1992 was we were in a situation where we were dealing directly with broadcasters. Now we are dealing with huge conglomerates that own both sides of the equation, including cable MSOs that if they raise the rates exorbitantly, a lot of cases they are just paying themselves.

Ms. ESHOO. Great, thank you.

Mr. Pyne, welcome. Nice to have you here. Should Aereo prevail in court, some network executives have been quoted as saying there would be a radical shift away from the free over-the-air broadcast signal that consumers have enjoyed for more than half a century. If broadcasters began offering programming on a sub-

scription only basis, do you think they would still be in compliance with the public interest terms of their FCC licenses?

Mr. PYNE. As it relates to the Aereo case, I mean, I know there are other network executives who have said certain things. Our company's position is that—and as I think is evident, we are in pending litigation with Aereo. We will always do everything we can to protect our content and the copyright and the illegal appropriation of our content.

Ms. ESHOO. Very carefully crafted response. Very good.

Mr. PYNE. Our focus is on the prevailing litigation.

Ms. ESHOO. I understand. Thank you.

To Mr. Singer, do you think our current law is sufficient in ensuring the availability of diverse independent programming like Ovation, Hallmark, and the Tennis Channel, and if not, why do you think the Cable Act is failing to accomplish its intended goal? Should we modernize the program access in the carriage laws, and if so, how? How many if so, how, is too—and I don't have very much time, but you have 36 seconds for a big question.

Mr. SINGER. I think that the laws as written with respect to program carriage, program access are fine. The problem is in the details of the implementation, and I actually think that the FCC has done a nice job here in implementing the rules, but of course, once they come to a decision, their decisions can be—well, the judge's decision can be overturned by the FCC and then there is a period again where the decision by the FCC can be overturned by the district court—D.C. Court of Appeals. And I think the problem now, very shortly, is that they have—the court has layered on certain burdens that will make it all but impossible for complainants to prevail. And so I do fear that at the current moment, we are in a position where there might not be any future program carriage complaints brought, and that would be certainly inconsistent with the interests of Congress.

Ms. ESHOO. Thank you very much.

Mr. Chairman, I am going to submit my other questions to the witnesses, and I am especially interested in the whole issue of copyrighted material deserving competition—I mean, compensation. I think it is a very important area for us to explore, especially when it comes to radio fairly compensating artists for their copyrighted materials.

So with that, I yield back.

Mr. WALDEN. Thank the gentlelady, and we will now go to the vice chair of the full committee, the gentlewoman from Tennessee, Ms. Blackburn, for 5 minutes.

Mrs. BLACKBURN. Thank you, Mr. Chairman, and Ms. Eshoo and I, I think, have some of the same questions. I am going to go right to the copyright issue.

Ms. Burdick, let me come to you. I appreciate your comments, and how you express for property rights and I am quoting, "recognizing local broadcaster's property interest in their over-the-air signal, permitting them to seek compensation", and I agree. Content deserves to be paid for and incentivized, but I am curious if you think the position the broadcasters have taken on the radio side, refusing to recognize a performance right for sound recordings, if that undermines your position before us as we look at the video

framework and the retransmission rights, because as you know, radio broadcasters say that they shouldn't have to pay performance royalties, because they help distribute an artist's music. So square that up for me. Where is the contradiction in that?

Ms. BURDICK. Sure. Just by way of background, our company has been in the radio business for 90 years, 18 months after the first commercial station was launched. We have been at it for a long time.

Mrs. BLACKBURN. That is fine. Quickly.

Ms. BURDICK. There has been a symbiotic relationship between radio and artists—I think I am on—radio and artists during that period of time, and the substantive difference is that when my radio stations play the artist's music, the listeners are getting it for free. In this case, we are talking about providers who are taking the local television broadcast signal, repackaging it, and selling it to consumers, and in that case, I am saying, in the latter case, if you are charging for it I should be compensated, but on the radio side—and I recognize this is a healthy debate in the industry—we are providing that as broadcasters for free.

Mrs. BLACKBURN. OK, but you know, you can look at it and say that they are helping to distribute your signal which helps to increase your ad revenues, and so maybe broadcasters—radio broadcasters should be distributing or should be paying that performance right for those entertainers.

Mr. Manne, you had a little bit to say about this. Do you want to weigh in on this side?

Mr. MANNE. Just briefly, I would just say I think the distinction is a distinction without a difference. I don't think that you can really square the rejection of the compulsory right in one case and not in the other, except other than to recognize that the broadcasters are net beneficiaries in one regime and they are net payers in the other, and so it makes perfect sense that they would prefer one over the other, but I don't think that squares with the public interest.

Mrs. BLACKBURN. OK, thank you for that.

I think that this is one of those points that we will continue to look at, because content does deserve to be compensated and the creator and the holder of that content deserves to be compensated.

Ms. Tykeson, given how government granted retransmission consent fees have grown from $216 million in '06 to what will be over $3 billion this year, who is benefitting and what is driving that growth?

Ms. TYKESON. Congresswoman, thank you for the question. There are two groups that are benefitting from the retransmission consent fees. Originally those fees were designed to allow—to help level the playing field between the local broadcaster and the cable company, and of course, back in 1992 it was a very different circumstance than it is today. What is happening now is the national broadcasters are requiring fees be paid through the local affiliates, and that is increasing the fees at huge rates, as you mentioned. So that all those fees are going to—they are accruing to the large conglomerate broadcast companies that control 60 percent of the top 50 networks on the backs of my customers.

Mrs. BLACKBURN. OK. You also stated in your testimony that there exist barriers to creating programming packages that are responsive to consumer need, so what has led to your business's hands being tied in meeting the needs of your consumers?

Ms. TYKESON. Congresswoman, there are three things that are happening that affect my customers in Bend, Oregon. The first is the size of the increases that we are asked to pay by all of these programming channels on an annual basis, which range between 8 and 10 percent, roughly, for every channel. In addition, with these large bundles of programming there is always a must-have channel in there, but there are a lot of other channels that maybe my customers wouldn't want, and what is happening is the large programming companies are forcing those channels into certain packages. I used to be able to have a special sports package that could meet the needs of customers that wanted sports, but now in many cases those expensive channels are being pushed down into the more popular packages that is increasing the prices for my customers.

Mrs. BLACKBURN. OK, my time is expired. Mr. Chairman, I have got a question I will submit to all witnesses and ask for their response in writing, and I yield back.

Mr. WALDEN. Thank the gentlelady from Tennessee, the vice chair of the committee. We will now go to the former chairman of the committee, the gentleman from Michigan, Mr. Dingell, for 5 minutes.

Mr. DINGELL. Thank you, Mr. Chairman, and I commend you for this hearing. I appreciate your kindness and courtesy to me.

To the surprise of all, I probably won't be asking questions today, but I have got some brief cautionary remarks.

I am somewhat alarmed by the prevalence of comments in the testimony of our witnesses today that are extraneous to the basic issue that we seek to address. Successive iterations of the 1988 Satellite Home Viewer Act, SHVA, were enacted by Congress in order to extend the principle of localism to the greatest degree possible to unserved viewers. I note that thanks to SHVA and with subsequent reauthorization, DIRECTV and DISH are now the second and third largest pay television providers in the country and are able to compete on a more level footing with the traditionally dominant cable companies. These facts tell me that SHVA and its successor legislation have well nigh fulfilled their intended effect.

Now the committee last considered the satellite television reauthorization legislation in October of 2009. That bill was comprised of nine titles, but it had only 30 pages or thereabouts. Its main provisions extended Section 325(b) of the Communications Act with respect to distant signal carriage and good faith negotiations, as well as addressed problems related to significantly viewed stations, and the after effects of the transition to digital television. Now to put this in simple terms, the committee's work on satellite television legislation has been predicated on the simple principle of localism, and it should continue to do so.

In closing, I recognize the landscape for video has changed significantly in the past 25 years. If the Cable Act or other laws related to the video marketplace are to be amended, they should be amended on the sound basis of a thorough record established by the committee's diligent record—diligent efforts to achieve such

record. At present, the committee has not established such record, and I have to confess that I don't think that most of my colleagues, including me, understand full well what the situation is or what it is we should do about these matters. And so without those kinds of things and without a record to define what are efforts should be, I think we would be well served to confine our efforts here to a clean reauthorization of the Satellite Television Extension and Localism Act. I would observe that to fail to do this is probably going to project the committee into one of the doggonest donnybrooks in recent history and I would hope that for the benefit of all of us and for the need to do other things that we would keep that thought in mind.

With that, Mr. Chairman, I return with my thanks and gratitude a minute and 44 seconds, and I appreciate your courtesy toward me. Thank you.

Ms. ESHOO. Would the gentleman yield?

Mr. DINGELL. If I have some time, of course.

Mr. WALDEN. Gentleman yields.

Ms. ESHOO. Thank you, Mr. Dingell.

I can't help but jump in here, given what the gentleman from Michigan has said. I think everyone here knows, and if you don't, you are going to be reading about it, that Mr. Dingell is now the single longest serving member of the United States Congress in the history of our Nation, and he has spoken again very, very wisely and prudently today. So we not only congratulate him and celebrate the work that he has done at this committee. Every major law that we can point to has his imprimatur on it. So thank you, Mr. Dingell, and thank you for what you said today, and bravo.

Mr. DINGELL. Mr. Chairman, I want to express my respect for the gentlewoman from California, and my thanks to her for those kind words. My old daddy used to say to me, son, he would say, it ain't how long you took, but how well you did and how hard you tried. I have tried to concentrate on the second part of that comment. Thank you very much, Ms. Eshoo, and Mr. Chairman, I thank you for your courtesy again.

Mr. LATTA [presiding]. The chairman emeritus yields back, and at this time, the chairman recognizes himself for 5 minutes. Again, I want to thank all of the panelists for appearing before us today, and it is a very important hearing and where we are going to be going in the next year and a half with the reauthorization.

If I could start with Ms. Tykeson, and ask you a couple questions. First, again, congratulations on your award. I represent a very interesting area, one that is south of Mr. Dingell's area in Ohio, and it goes from an urban area to a very rural area. And so it is served by very many smaller operators like BendBroadband. I want to ask you about set top boxes, if I could. You have called on Congress to repeal the band on integrated security on these set top boxes, but you note in your written testimony that your company was granted a waiver of that rule. Why is this rule relevant in today's role, given all the devices that folks out there are able to get video programming from? And do we still need the 629 rule as a follow up?

Ms. TYKESON. Thank you for your question, Congressman.

We were successful in receiving a waiver from the separable security ban back in 2008, so we were able to go all digital. We were the first company in a traditional cable company to go all digital and reclaim all of our analog spectrum. What has changed even since then is the plethora of devices that are available and so determining how people receive their signals using hardware in today's world where applications or software can do the job is a much more efficient way to do that. A lot of companies can't do—put together a waiver because they are too small, and having this rule on the books that is outdated and no longer relevant is costing billions of dollars and preventing technology from moving forward. Thank you.

Mr. LATTA. Let me just follow up. You just said some of the companies out there can't do it because they are too small. How small is too small?

Ms. TYKESON. Well, I am a member of the ACA, which represents small operators, and there are companies out there with a couple of hundred cable customers.

Mr. LATTA. OK. Let me follow up with you on that. I understand that the FCC has admitted that their cable card rules have not been successful at ensuring a retail market for set top boxes as Section 629 of the '96 Act intended. However, the FCC has been encouraged to adopt all vid rules that apply to all pay-TV providers to remedy this situation. What is your position on that?

Ms. TYKESON. Well, I think the problem with the rules that—with regards to the—excuse me, I am a little bit nervous.

Mr. LATTA. Go right ahead.

Ms. TYKESON. Some of these rules are only applying to cable companies, and they are only applying in the United States. And so we are artificially impacting the cost of hardware, and I am not in favor of trying to regulate who should be doing what with technology that is changing fast and rules like we have in the '92 Act become outdated and they are impacting the marketplace and how it unfolds.

Mr. LATTA. Thank you very much.

Mr. Pyne, if I could ask you just a couple questions. I find it kind of interesting in your testimony you stated that in cooperation with our MVPDs, for example, cable, satellite, and telco distributors, you now have—you make live streaming of many of our channels available to subscribers on their tablets and smartphones, and having heard, you know, through the testimony today and we hear all the time is how things are really changing out there, how people from, you know, across the country are getting their information.

I am just kind of curious, when you talk about, you know, making that live streaming available, you know, on all these different channels of subscribers, do you have any breakdown of like the ages of individuals or the regions? Is it particular or is this across the Nation on the age groups, just out of curiosity, for one?

Mr. PYNE. On the specific—with our Watch services, I don't have the breakdown. We can certainly look into that. Just to be clear, part of the reason we call this TV Everywhere, the industry calls it TV Everywhere, and it is really—it is part of the industry's effort to continue to find ways to provide an incredible value package to consumers. Just quickly, this week, Michael Powell, who is the

head of the NCTA, said on stage, you know, the average cost per hour of viewing entertainment content is 23 cents. So 23 cents is the average cost of viewing, which in terms of entertainment options, he was saying is a very great bargain. I mean, I commend companies like Bend, DIRECTV, and others for the great job that they have done in creating that value.

I will tell you that ABC.com, in 2004 when we had such great hits as Lost, Desperate Housewives, and Grey's Anatomy, we found that 15 minutes they were off the air, they were pirated around the world, so we created a service called ABC.com, which is live streaming at that point, and the statistics we found in that is that the average age of a linear television was in the earlier 40s, but the average age of someone who watched ABC.com was in his or her early 30s. So I think that that may give you some indication.

Mr. LATTA. Well thank you very much, and my time has expired. At this time, I recognize the gentleman from Pennsylvania, Mr. Doyle, for 5 minutes.

Mr. DOYLE. Thank you, Mr. Chairman.

Ms. Burdick and Ms. Tykeson, both of your companies deal with retransmission consent as small cable providers, yet you seem to have a disagreement on the effectiveness of the regime. Why do you think that is?

Ms. BURDICK. Well as I said, I am the small broadcaster, small cable company at either side of the table. There have been some remarks today about consolidation of broadcasters. We are small fries compared to the consolidation of the video provider world. The top four video providers control 62 percent of the market. The top 10 control 91 percent, so in my negotiations as a broadcaster, I will start with a major MVPD with millions of subscribers that says you cover in your six markets 1.8 percent of the country. I can afford that churn. So it is a tough business negotiation either way. If I spoke as a cable operator, which I am not today, I am speaking on behalf of NAB, but the negotiation is equally as tough on that side of the table and I think what it proves is that the marketplace works. There are thousands——

Mr. DOYLE. So as a small cable operator, though, you think it works?

Ms. BURDICK. Yes, we made it work.

Mr. DOYLE. Ms. Tykeson, you have a different view?

Ms. TYKESON. I don't think it works because it is not a free market, so I have a choice of one affiliate in my market, you know, and in some cases it is a great affiliate because they provide local news. But if we have an impasse, for example, I am given a price I have to pay, I don't have any recourse. I can maybe negotiate a little bit, but at the end of the day, that broadcaster can take the channel off of my system. So my customers either have to pay the price or we go—have to go black with the channel. We can't bring in another signal during that interim period.

The other point I wanted to make, in some markets, about 48 markets around the country, there are broadcasters working together to negotiate with the MVPD or the local operator, and that collusion is driving up prices by about 20 percent and making it very challenging to negotiate. I don't think there is any other industry where competitors could work together to collude to come up

with a solution. I know Ms. Burdick in her testimony said that in her market she is not doing that, but my smaller cable constituents around the country have had those circumstances that are very disruptive to their customers.

Mr. DOYLE. Thank you.

Mr. Pyne, has Disney ever commissioned the purchase of your most popular channels on the purchase of your least popular channels?

Mr. PYNE. No, we have not. In fact, I have signed three affidavits attesting to that fact that we do not employ what is commonly known as tying.

Mr. DOYLE. So has anyone ever requested price quotes from you for just your most popular channels only?

Mr. PYNE. Excuse me?

Mr. DOYLE. Has anyone ever requested price quotes from you for just your most popular channels?

Mr. PYNE. Yes, they have, and in fact, ESPN and ESPN–2, which are two of our most popular channels, 15 percent of our cable systems out there only carry ESPN and ESPN–2.

Mr. DOYLE. Very good, thank you.

Ms. Tykeson and Mr. Palkovic, how does channel bundling affect the types of packages that your companies can offer, and how does it affect the prices you charge your consumers?

Mr. PALKOVIC. Well, with DIRECTV, it is simple. We are offered a price for all of the channels with a particular program, including retrans. Any offers that would break that down into individual pieces are just economic. I think that is intended, so that usually doesn't go anywhere, and you know, you end up with situations where even if we could create a package for consumers that was affordable that only had in that package enough programming to support a price point that they would want, it will run afoul of penetration obligations in those agreements. So you can do it, but you end up either having to stop selling that package or you have to pay through the nose to the programmers for violating those terms. So it is not just a tie-in involving channels, there are penetration obligations on the more popular channels that accrue to the rest of the suite of services. So it is a tough situation today to deal with.

Mr. DOYLE. Thank you. Ms. Tykeson?

Ms. TYKESON. So what that means is if we wanted to have a channel down in a lower level—well, usually we don't, but if say, for example, with the basic cable, limited cable, we would be prevented from moving those channels to a higher tier if they are too expensive. So we are forcing our customers through—unfortunately, the programmers are—to put these channels in tiers where customers don't want them, and if we pierce the floor, and I think that is what Mike is saying, now we are in breach of contract. So I have to put these channels in these wide penetrated tiers and customers don't want them. My packages are becoming way too expensive, and it is just not fair for my customers.

Mr. DOYLE. Thank you, Mr. Chairman. I see my time is up so I will submit the rest of my questions for the record.

Mr. LATTA. Thank you very much. The gentleman yields back, and the chair now recognizes the chairman emeritus, Mr. Barton from Texas, for 5 minutes.

Mr. BARTON. Thank you, Mr. Chairman.

Before I go into my questions, I have a commercial. Tomorrow night at I think 7 o'clock, Mr. Doyle's behemoth of a team, the Ragtag Republicans, and I am scrounging a team together this afternoon to make sure that we can get nine folks to show up, but the game is at 7 o'clock and there are a lot of Energy and Commerce Members. Mr. Doyle is the manager on the Democrats and I am the manager on the Republicans. Mr. Scalise he is our second baseman, so we are hoping——

Mr. DOYLE. We will be gentle, Mr. Chairman.

Mr. BARTON. You what?

Mr. DOYLE. I said we will be gentle.

Mr. BARTON. Yes, well we want you to be very gentle. Now if you will start the clock I will get into my comments.

I have three homes, which is unusual: two in Texas and one up here. One of them is covered by DIRECTV, one is covered by Comcast, and one is covered by Charter Communications. The two that are covered by cable, you know, also includes an internet package. DIRECTV is just TV. All of those I am paying in the neighborhood of $200 a month each. I am really looking at going back to the old free TV. I mean, I think it is illustrative when you are having commercials show up on cable television that you can get an antenna and the government requires free over-the-air broadcast. You know, we have got a whole generation of Americans who don't realize that they can get free over-the-air TV. It is like it is a new product, and I am about to rejoin going back to the future, because of the cost.

Now, the last time we did a major cable bill, there was a Republican Congressman named Nathan Deal, and he was hot to trot on ala carte pricing. And I discouraged him and—but anyway, we got him—we let him have a vote on his amendment. I think he got two or three votes. Well he is now Governor of Georgia, but if he were still a member of this committee, I think he would get a lot more votes. I am not real happy—I understand that I can get 1,000 channels, but I only watch two or three, and my friends at DIRECTV—I know it is not fair to pick on you, but one of the channels that I really, really like to watch is FOX Southwest. It is the regional sports channel in Texas. In order to get it, I had to pay about 70 bucks for a package, a tiered package of which out of all of those the really only one I want to watch is FOX Southwest.

So I am not sure—I haven't talked to Mr. Walden or Mr. Upton. I don't know what their personal views are on reauthorization, whether they want to reopen it or they just want a so-called clean bill. But if they want to go beyond a clean reauthorization, I am very willing to look at the basic tenets and revisit it, because to the average American family, 200 bucks a month is a significant amount of money and it is—that is about—in three locations. Now that does, in two of the three, includes an internet package. It doesn't in the TV package for DIRECTV. So that is just something as an observation.

My question I am going to go to Mr. Singer here, because he seems to be the economist neutral man here. Retransmission consent was meant to be a level playing negotiation between a local broadcaster and a local cable operator. And in many cases, the local

cable operator was a national cable operator. It wasn't somebody like Mrs. Tykeson, who has a local system. But apparently now, retransmission is becoming a national negotiation between a broadcast network where the local affiliate yields to the national network, who then gets a fair amount of the retransmission package if there is compensation. That was not the intent of the Congress, at least, that is not my recollection. So I would like Mr. Singer's comments on this, how retransmission has evolved and if he has a solution, if he thinks it needs to be changed, what would he go to?

Mr. SINGER. Sure. Thanks for putting that to me, and I will try to be fairer than them all. But the point is that economics or the way that economists think about things, is there a market problem? Is there, say, vertical integration that can distort incentives relative to an independent in this situation? When I look at this problem, I see two behemoths on both sides of the bargaining table. And in this situation, you will get some failures in a sense that deals won't be struck. But there isn't a very solid basis, at least in economics, for regulatory intervention in those circumstances. It seems to me that—and this is an important caveat—so long as the copyright is protected on the broadcaster's side, we should just let those guys basically beat each other over the heads until they come to the right price.

Mr. BARTON. So you don't see a problem with the current law?

Mr. SINGER. I think that there is—again, what I have seen put on the table, I think, in Mr. Manne's testimony is that if we fix the copyright issue we can repeal the law and let market forces dictate the outcomes.

I do see problems, I just want to say, in terms of the size of the package that you mentioned before and I am sympathetic to that, but on this issue of whether or not government should lean in and put their hand on the scale of a negotiation between two large players on both sides of the equation, that doesn't have a very strong basis in economics.

Mr. BARTON. OK. Thank you, Mr. Chairman.

Mr. LATTA. Thank you very much. The gentleman yields back, and at this time the chair recognizes the gentleman from New Mexico, Mr. Lujan, for 5 minutes.

Mr. LUJAN. Thank you very much, Mr. Chairman.

Mr. Barton, I almost want to yield you more time to get to some of those questions as well, sharing some of those concerns, especially with the rural district that I represent.

I guess a question to Mr. Palkovic, Mr. Pyne, and Ms. Tykeson, along the same lines, last year the FCC released its annual survey of cable industry rates and found that prices from 1995 to 2011 time period increased by an annual rate of 6.1 percent, compared to only 2.4 percent increases in the overall consumer price index. To what factors do you attribute those causes, especially as we talk about the impact of programming to many of our consumers?

Mr. PALKOVIC. Sure. I think DIRECTV in recent years has been going up annually about 4 percent with our customers all in, and just to kind of put it in some context, over 40 percent of our costs are costs paid directly to the programmers, to the content holders, and their prices have gone up double digits, so you know, when 40

percent of your costs are going up 10 percent and we can only get 4 percent from our consumers, because we still have to operate in a competitive environment, we are not making any money on this. So all the other operating costs we have for satellite and broadcast centers and overhead and customer service—and we are a huge believer in providing, you know, the best customer experience, we are eating those costs because all the money that we are getting annually is going directly to the content holders. So if people think that we are, you know, out there making money on these increases, we are not.

Mr. PYNE. I think——

Ms. TYKESON. So in our case, programming is the number one cost for my company. Our expenses for programming are going up twice as fast as our revenue from video product. I wanted to also just comment on Congressman Barton's point, because what we have now is this shifting in the power. We are negotiating—MVPDs like Mike's company and my company are negotiating with a single broadcaster in a market, so this is the only example I can think of where you have more competition and higher prices, and it is because I don't have any place to go besides to those broadcasters or programmers to get that particular content.

Mr. LUJAN. Mr. Pyne?

Mr. PYNE. If I may just say something on programming costs. First of all, I want to make one point clear is that at the Walt Disney Company, we only own eight television stations so when we negotiate retransmission consent, we only negotiate for those eight stations. It sounds like there is a belief that all the local broadcasters are puppets in some way. Believe me, there is a great exchange of dialog between local broadcasters who are affiliates and us in terms of whatever the appropriate exchange of value, but you know, they are the ones that drive that local decision and that local negotiation.

You know, we at the Walt Disney Company spend billions of dollars every year in creating great content. I said earlier that, you know, for ABC alone it is $3 billion a year, but we always—whatever the service, we always are looking to make our networks must-have. I wish it were as easy to call down to the local store and say here, I would like to order two hits, but the investment and the risk in developing that content is huge for us, and ultimately, we are looking, in terms of our negotiations, to find, you know, a fair way of reaching terms with whomever our distributor is.

You know, one of the advantages that small rural cable systems have is something called the National Cable Television Cooperative, or NCTC, and in that case for all of our cable networks, ESPN, Disney Channel, ABC Family, we negotiate—and BendBroadband is a member, you may be a member, too—we negotiate as if they are the fifth—eight million subs, they represent eight million subscribers, and we negotiate as if they are the fifth largest MVPD.

Mr. LUJAN. Mr. Pyne, I am sorry, I am going to have to just jump in here because I am going to lose all my time here.

Mr. PYNE. Sorry.

Mr. LUJAN. But I would love to get that maybe in a written way and we will get that resubmitted.

Ms. Burdick, I am sympathetic to a comment that you made in your prepared testimony that you are concerned that local communities could lose access to local programming. I think that we would both agree that access to local news, local programming is critically important. But I want to talk to you about something that is broken. I represent a district where many of my constituents can't receive local programming because of the DMA that they are in, and I would like your opinion on what we can do to make sure that we are including orphan counties to get this done, because if not, I want to work with my colleagues to find a way to fix this. Since I have been in Congress I have been asking for help in this area and I have not found anyone willing to help me out to get this fixed.

Ms. BURDICK. Well, I can tell you the head of the NAB, former Senator Smith, was successful on the Senate side in finding some fixes there, and we will be glad to work with you. Broadcasters want local citizens to have local programming, and we would be glad to work with you.

May I take just a minute to address a couple of the comments here? I think you raised something that was really important where you quoted cable rates from 1995 on. The fact of the matter is broadcast retransmission consent has only existed since 1992, and from a practical basis, it was really not until the late '90s or 2000 that most broadcasters began successfully negotiating for pennies of every programming dollar to support local news and information. The cable rates have been going up in a larger percentage long before broadcasters were being paid for the most popular content on cable systems.

Mr. LUJAN. Mr. Chairman, I know my time is right now, but as I look for some assistance to get this done, some of my savvy consumers, all they do is they go and get a post office box out of a metropolitan area in the middle part of the State, the largest city of Albuquerque and then once they send that bill to their satellite provider, then I will be darned, they get local programming. You know, if it is not against the law, we need to make this work somehow. This is just ridiculous. These are farmers and ranchers that are in isolated areas that want local programming, want to know what is happening in the State that they are proud to belong to, and we've got to get this thing fixed.

Thank you very much, Mr. Chairman.

Mr. LATTA. The gentleman yields back his time, and at this time the chair recognizes the gentleman from Louisiana, Mr. Scalise, for 5 minutes.

Mr. SCALISE. Thank you, Mr. Chairman. I appreciate that and enjoy the testimony.

I want to start with Mr. Palkovic. In your testimony you had stated that competition normally drives down prices, but here the Congressional Research Service recently put it that "Ironically the market consequence of greater competition in the distribution of video programming appears to be greater negotiating leverage for the programmers with popular and especially must-have programming, resulting in higher programming prices that MVPDs tend to

pass through at least partially to subscribers." How do you believe government regulation has contributed, if at all, to the findings that we saw from the Congressional Research Service?

Mr. PALKOVIC. Well, I think it gets back to the tying and bundling of the retransmission consent rights that broadcasters have that are tied to the 1992 Cable Act, coupled with the consolidation of programming that has taken place since that time. Right now, there are six major companies that control the majority of programming. They are not all broadcasters, but four of them are broadcasters, and they behave somewhat differently depending on who they are. But when they bundle all of their content together, even the content that is less desirable that people should be allowed to choose in more niche packages, in exchange for a very much high in demand programming, they really just point the gun at your head and say you got to take it or leave it. What makes it even worse is when they throw blackouts on top of that, so it sounds like it is a free market situation, but underlying that are all the protections they have for the local broadcast channels. And it may not be the smaller mom and pops, that may be a more direct kind of traditionally fair discussion, but these large conglomerates are basically using all the rights they have with the Cable Act and leveraging that against distributors and driving the prices up.

Mr. SCALISE. Let me ask Mr. Pyne, I know when you talk about the different services that your company provides, you know, my kids would probably have a revolt if the Disney Channel or Disney Junior went off the air. I would probably have a revolt if ESPN went off the air. If there was a repeal of retransmission consent, but also tied in with the repeal of compulsory copyright license, which I know legislation I brought forward would do—and usually the compulsory copyright components are often left out of the conversation. Wouldn't you just revert back to a normal, as Mr. Manne described it, a normal copyright negotiation where you would have two parties that would still be sitting at a table negotiating, but in this case the consumer demand would be driving a negotiation that would still be based on a mutually agreed upon price?

Mr. PYNE. We don't support the repeal of both the retrans and compulsory copyright. Clearly in that discussion there are some things of interest to us in terms of the economic discussion, but we don't support the repeal of retransmission consent for the reasons I cited. I think in full candor, one of the reasons is the potential uncertainty we view that could take place in the marketplace. You know, from our perspective and certainly from other broadcast perspective, we believe the system is working in terms of the negotiations. Yes, there are disruptions. There are not officially blackouts because broadcasters are still broadcasting their signal, and as in any negotiation in the current system—I have personally been involved in two. One is when Time Warner dropped ABC in 2000, and then in 2010 when we dropped Cablevision. In the first case it was resolved in 36 hours, in the latter—and that was just ABC, by the way, it was not other networks—and the latter resulted in 20 hours of ABC being off the air and we reached a resolution.

Mr. SCALISE. Thanks. One of the earlier—when I did my opening, the reason I held up the brick phone, you can find these on the Internet still, which we were able to do—it doesn't work. I can't get

it to work. But the laws that were written during the time when this was the technology—and I brought up the Aereo case earlier and I appreciate that there is ongoing litigation, you can't talk about it here. But if you look just a few weeks ago, the head of CBS actually did chime in on his and indicated that they are right now in talks with pulling CBS down and going to a cable format. Now, probably unlikely that it gets to that, but the fact that CBS, one of the major broadcasters, is right now talking about the possibility that if this court case goes a different way, that they could pull down their local broadcast signals and just go to a pure cable format tells you the marketplace has changed dramatically because of technology, and yet the laws don't cover that. So I want to finish with a question to Mr. Manne, how do you view this marketplace as it is evolving in the context of laws that were written in 1992 that really haven't been updated, though the technology has changed dramatically?

Mr. MANNE. We had amazing progress in this market, despite the fact, as I pointed out in my testimony, but clearly suboptimal rules here. I think in particular when I hear all this discussion about high prices for must-have content and all the talk about bundles, I think Hal and I seem to substantially disagree about this. What I hear is that there are pieces of the existing regime—we have talked about them, starting as you and I both agree with the compulsory license, but going through all of the many we have mentioned today, that do dramatically, I think, impair the free contracting among the various parties here and probably do affect price, but it is also really important that at the end of the day, you do have to pay a price for things like things that you must have. If you really want something, you usually have to pay more for it, and especially when it comes to the availability of content, and that means both the production of the content and the distribution of it, you know, I see this incredibly vibrant market with more content than we have ever had, more avenues of distribution than are imaginable, and the fact that the particular business model by which they are distributed, in some cases, for example, bundled, that doesn't foreclose access to all of this wonderful content. That is not how it works. And because it doesn't work that way, I see it as a valid business decision that these content owners and the distributors that they negotiate with have made to actually maximize the production of that content. That may cost a little bit more—seem like it costs more, because you have to pay more, for example, the bundle, but that has generated such a proliferation of content and again, distribution mechanisms for it that we have this really remarkable market that could be even better, because there are such easily identifiable problems with the regulation of it that we could dispense with it.

Mr. SCALISE. Thank you. Appreciate it, Mr. Chairman, and I yield back the balance of my time.

Mr. LATTA. Thank you very much. The gentleman yields back. At this time now, the chair recognizes the gentleman from Utah, Mr. Matheson, for 5 minutes.

Mr. MATHESON. Thanks, Mr. Chairman, and I do appreciate the panel today. I find this to be a rather thoughtful and informative

hearing, which I wish that was always the case, but this is a really good one today. So I appreciate all of your input.

I had a couple of questions. There are so many issues out there, but Ms. Burdick, I wanted to ask you, there is a suggestion that has been put out by some folks that there is a situation where out-of-market programming could be allowed during retransmission consent disputes. If that happened, could you tell me what the impact would be on your company if that happened during a retransmission dispute?

Ms. BURDICK. Sure. I will give you one line and then I will elaborate. Imagine what it would have been like in Moore, Oklahoma, had distant signals been broadcast the day of the tornadoes. Imagine what it would have been like.

We as local broadcasters are providing local news, weather, and sports services that are not duplicated by anyone else, and the fact of the matter, as the panelists have alluded to us is must-have programming because it is watched more on their cable systems or satellite systems than any of the channels that they provide. You have to go to a CW, a My Network station, over-the-air that even gets close to the top-rated cable network, so we are providing important content. If a local signal—if a distant signal was allowed to be imported, a couple things would happen. There will be more disputes, not less, that will last longer because there is no incentive for the cable or satellite operator to solve that dispute. They are bringing in a signal they are not paying for, so why would you reach a resolution with a local content provider to pay for that content, number one. At the second time, they would be shrinking my market area. I would be losing eyeballs. When I lose eyeballs, I lose advertisers. When I lose advertisers, I lose dollars. The only place, as Ms. Tykeson rightly refers to, cable's highest programming cost—cable's highest cost is programming. Mine, as a local broadcaster, is people doing news and local information. When I lose revenue, that is the only place I have to go to control my cost, and that would be the impact. Less news, less local information.

Mr. MATHESON. Thank you.

Ms. Tykeson, you talked about in your testimony how your costs for your consent fees have gone up over the last few years. Roughly how much of your—what is your breakdown of how much your programming dollar breaks down between what is broadcast and what is not?

Ms. TYKESON. So the—I would say——

Mr. MATHESON. Sorry, could you turn your mike on?

Ms. TYKESON. Sorry.

Mr. MATHESON. Thank you.

Ms. TYKESON. The prices for retransmission consent are growing at a faster rate than the costs for my other kinds of programming, but both are going up by significant amounts. I would say with these recent rounds of retransmission consent negotiation, probably doubling and tripling each cycle. And then in addition, with the large bundles of programming that I am required to offer because there is not a system that allows me to offer smaller packages to my customers, each time those negotiations come around, my costs are going up, in some cases, by 20 to 30 or even more, depending on what is being required of me in terms of moving some of those

channels down, offering more channels, and then also taking double or triple the cost of inflation increases on each one of those channels that we provide to our customers, and we have to, in accordance with those agreements.

Mr. PYNE. Can I make one clarification, please, and I have heard this several times. I think I stated earlier that we don't employ tying. Like other businesses, we do offer packages of programming, but I guess I will say three things. Number one, clearly we spend an inordinate amount of time, energy and money in developing must-have programming, and that is from the very top of our company, creative excellence. Two is, you know, when a channel doesn't do very well, we, in fact, change it, so recently Soapnet, great channel in the 2000s, its popularity has waned, so we could have just tacked on another channel and added more, but in fact, we are switching out Soapnet and launching Disney Junior, which has incredible programming, and third, if I may finish, you know, we would love all of our channels to be 100 percent penetrated. We have a portfolio. We love them. But in fact, even on BendBroadband, our ESPN news channel is only penetrated 18 percent, Disney Junior 49 percent, and on DIRECTV, ESPN deportes is only penetrated 6 percent. And finally, we have—and we understand that. That was a negotiated deal through fair market terms. And finally, you know, we have done as a company over the last little over 2 ½ years seven of the top ten deals with major companies, with smaller companies, ranging from Cox Communications to Cablevision, to AT&T, and certainly Comcast. We have done deals that after 30 years of negotiating in the marketplace—and I have been doing this for 21 years—I think we have established standard rates and standard terms.

Ms. TYKESON. If I may just add, because my neighbor here mentioned the National Co-op, which is an opportunity for companies like BendBroadband to participate, but some of the problems with the rules that we currently are operating under is the co-op is not really treated truly like a large distributor, so the prices that are offered to the co-op members, and terms in particular, are different and in most cases, it costs more or there is more stipulations and terms that are not attractive or as attractive as a large distributor might be able to get. Thank you.

Mr. MATHESON. Thank you. I appreciate everyone's comments. Mr. Chairman, I yield back.

Mr. LATTA. Thank you very much. The gentleman yields back, and the chair now recognizes the gentleman from Vermont, Mr. Welch, for 5 minutes.

Mr. WELCH. Thank you very much, Mr. Chairman. This is a great hearing. I was on the committee two Congresses ago and then I was off last committee, and I am back. And things are pretty confusing for consumers, anyway. You know, I find this to be a very excellent hearing and really appreciated your testimony, and Mr. Chairman and ranking member, it is fabulous to be here.

But you know, the work that everyone is doing is so important, and how you do it and what the market requirements are in order to have the revenue stream in order to do it obviously is essential, and we are talking about this in the context of satellite reauthorization, which Congress has successfully done. But the kind of ele-

phant in the room that has been alluded to, but not directly addressed, is the Cable Act of 1992. I mean, the world is totally different. The revenue models are totally different. The consumer needs and opportunities are completely different, and it is raising the question in my mind as to whether or not, in fact, there needs to be a serious revisit of the Cable Act of 1992.

In my office, I have had many of you or people in your sectors of the very challenging industry come in and talk about what they perceive as problems with the status quo, some people saying the status quo is the right way to go, but that is very much in contention, and we are even hearing that amongst you. And the bottom line—and I don't have any answers—is that somehow, some way we have to figure this out and do it in a coherent approach where there is an acknowledgment that there are new tensions. I mean, just think about the things we have heard tonight—this afternoon. Mr. Lujan talking about the orphan counties and not being able to make any progress. What I hear about a lot is from my consumers and the cost of this, and Mr. Latta, I really appreciate your leadership. We started a rural caucus to try to figure out how we can help folks in rural America basically get a fair shake on this. The dilemma here from my perspective is that the consumers just don't have any power to affect the outcome, but they are feeling the pressure of these high bills. They need the services you provide. They benefit from the content that you create. They certainly benefit from local broadcasting. We had Tropical Storm Irene, and the lifeline for us was local radio and local television. But on the other hand, they have no control over what that bill is. They get all these channels that they never watch, you know. They kind of wonder why these baseball players are getting $230 million contracts and they can't swing a bat anymore. And you have got a revenue model where basically there is no liability for the general manager who makes the deal, because they can just pass it on to the cable subscribers. People are getting kind of fed up with that, right?

So you know, Mr. Chairman and ranking member, I just wonder whether it is time for us to not only look at the satellite STELA, but to look at the Cable Act of 1992 and understand that it has got to come out in a way where the competing interests and needs require a solid and stable revenue stream in order to provide the benefits to consumers, but the consumer has to be part of the equation.

So I am just going to go down the line and ask whether a revisit of the Cable Act, in your view, makes some sense, aside from the fact that everyone always fears that whatever can go wrong will go wrong if Congress starts trying to change anything. So I get that part, all right, but let's start with you, Mr. Palkovic.

Mr. PALKOVIC. Sure. Obviously we came here to address, you know, the topic of STELA, but I think it is safe to say that the common theme here is that the rules are old, they need to be revisited. It can be a little bit overwhelming to think about how difficult that would be. We tried to come up with solutions that were anywhere from, you know, the total deregulation approach where everybody gives up all their rights, and quite honestly, including us, we put the good and bad on the table and start over. Two more targeted approaches to take care of the things you pointed out that

are directly evasive to the consumer, because that is really the problem we have is when you use the consumer with blackouts and other tactics like that to deal with your free marketplace negotiations, that is where we think they have kind of gone over the line. But yes, I don't think there is any question of revisiting——

Mr. WELCH. My time is about up, but I just would be interested in a short reaction to whether revisiting the Cable Act makes some sense. Go ahead.

Mr. PALKOVIC. Pardon me?

Ms. BURDICK. Do you want us to continue or respond later?

Mr. WELCH. Well you can respond later, but a yes or no might be helpful now, because I am out of time. We have got a very generous chairman here, but I don't want to wear out his patience and good will.

Mr. LATTA. Well, if you just want to go down the line and answer a yes or no question, go right ahead.

Mr. WELCH. Just yes or no.

Ms. BURDICK. I can't answer it yes or no.

Mr. PYNE. Me as well.

Ms. TYKESON. I would say yes, and also provide a written response, but that will take time, so I would go for some additional fixes now, some of which I have mentioned. Thank you.

Mr. SINGER. I think that there is still a valid need for the program access and program carriage protections in the Cable Act, but aside from those, I think it would be worthwhile revisiting the larger picture.

Mr. MANNE. I think absolutely. In fact, I don't think you can really address STELA without addressing those other parts. I would just say that when you do, the most important thing is—I disagree, of course, with Hal about program access and program carriage, but the most important thing is to understand how your regulations can avoid enshrining, you know, the particular contractual arrangements we may have today as though those are the only possible revenue models or anything else. I think that is what has happened and really fundamentally——

Mr. WELCH. OK, thank you very much, and Mr. Chairman, thank you.

Mr. LATTA. Thank you very much. The gentleman yields back and the chair now recognizes the gentleman from Colorado, Mr. Gardner, for 5 minutes.

Mr. GARDNER. Thank you, Mr. Chairman, and thank you to the witnesses for your testimony today. Listening to the opening comments, listening to the questions, I think there is no doubt from the members here, the witnesses here today that the rules governing today's video marketplace were crafted 21 years ago, a very long time ago. In fact, none of the rules currently apply to some of the latest Internet competitors in the video space. So with these dramatic changes that have occurred in the video marketplace, I think we have got a great opportunity before us to examine what has changed and how current laws can help or hinder advancement of the free market and market innovation. I know the broadcast industry believes the system is working, and many others disagree. The rise in programming costs and retransmission consent disputes indicates that there are issues that we need to look at.

So to DIRECTV, I would ask this question. Mr. Palkovic, is that right?

Mr. PALKOVIC. Palkovic, yes.

Mr. GARDNER. Palkovic. Why do you think STELA is the right vehicle to move forward with the discussion of how to change regulations in the video industry?

Mr. PALKOVIC. Well, I think STELA has proven to be a very, very important and appropriate piece of legislation for us. We obviously have a number of things that benefit consumers in that Act. We certainly wouldn't want any of that to change, particularly taking away programming from a million and a half customers without really—I don't see any benefit to the broadcasters of doing that, other than potentially hurting the satellite industry, but it will disenfranchise those customers. So since we are in the process of reauthorizing that to the extent we can have any even minor changes like the blackout issue addressed, and we thought it was appropriate.

Mr. GARDNER. Ms. Burdick or Mr. Pyne, why do you think STELA is not the right vehicle to move forward with the discussion of how to change regulations in the video industry, and could you address Ms. Burdick's question—testimony that notes that TV stations are underpaid in terms of retransmission consent dollars?

Ms. BURDICK. Well, I think that was evidenced again today when Representative Matheson asked the question specifically how much of a cable programming dollar goes to local stations? It wasn't answered. We continually get this percentage on retransmission consent, and math was never my strong suit, but when you start from zero——

Mr. GARDNER. Don't work for the IRS.

Ms. BURDICK [continuing]. It always looked pretty big. The fact is that broadcast programming is the single highest viewed programming on any satellite or cable system, yet the compensation we receive for producing that program is miniscule compared to some of the other providers.

I haven't said anything as the term blackout has continued to be used today, and I would just like to underscore one issue. These are contractual negotiations and relationships, and when we reach an impasse, we are still on television. We never go away. I hope Representative Barton does take a look at what is available now free over-the-air since he last looked. It may be 20 or 30 stations, free over-the-air, different kinds. Cable is not asking you today with STELA that if they reach an impasse with HBO or AMC to be able to import that from another cable system, so why should it—why should they be allowed to import a broadcaster?

Mr. GARDNER. Mr. Pyne, do you have anything to add to that?

Mr. PYNE. The only thing I would add is in terms of why we are comfortable with sunsetting STELA is that we believe the fraction of affected Americans—and we are trying to understand the exact number—but it is small enough that through private contract or private negotiations we could actually find a solution with the satellite companies.

Mr. GARDNER. Thank you. Broadcasters referred to retransmission consent negotiations as a free market and asked the government to refrain from intervening, yet many on the panel have

argued today in some questions that there are a number of government mandates that prevent the market from being free, such as retransmission consent, compulsory copyright, basic tier placement, required tier buy through for cable, network non-duplication, and syndicated exclusivity. They further argue that broadcasters can decide which MVPDs carry their content, but MVPDs can't choose which market to get their programming from. And so if I could just start down the panel at the end—and I am going to run out of time quickly and I have some other questions here, but please explain why you think the regime is or is not a free market.

Mr. PALKOVIC. Well, I think to be concise here, I think the broadcasters are combining their rights to carriage in a local market and they are leveraging those rights with all the other cable content that they have acquired over time, and they know that at the end of the day, using tactics like blackouts, bring the consumer into play and put the onus on the distributors to deal with the consumers, because they don't deal with the consumers, we do.

Ms. BURDICK. I will let Mr. Pyne answer one of the other issues. I will take a small chunk of that, and that is in all of the regulation, whether it was copyright or the Cable Act, what Congress wisely recognized is the value of localism and protecting local markets in a marketplace that supports local news and information. That still has to be recognized, because if local broadcasters aren't providing those lifeline services and local news, weather, and sports, who else will do it?

Mr. PYNE. In terms of retransmission consent, we view that as a mechanism of actually entering into negotiation, and I think one of the tenets of our business is we spend a lot of money in creating content, and we want to be able to, you know, get an appropriate return on that content. Remember, when you do retransmission consent you only—you enter into negotiation and you can either reach an agreement or not.

And just to be clear—and I have said this before—and I know we are—ABC is one of the big four broadcasters, but when we negotiate retransmission consent, we are not negotiating for the country, we are negotiating for our eight owned stations and those local markets only. I just wanted to be clear about that.

Ms. TYKESON. Although those markets represent a huge percentage of the United States.

Mr. PYNE. It is actually—to be clear, it is only 23 percent of the United States, which is smaller than any of the other broadcast groups.

Ms. TYKESON. So I would—to answer your question, I would say that it is not a free market. In Bend, Oregon, I have one broadcaster to negotiate with. That is it. If we can't come to an agreement on the price—and by the way, we have paid in other ways over the years in terms of launching additional channels and meeting other demands. So while it is true that retransmission consent fees have started recently, there were lots of other demands before that. So we don't have a free market. I don't consider $6 billion to be miniscule in terms of what consumers are paying for this programming. If we come to an impasse, really I have two choices. One is to take—to pay the price and pass that along to my customers, or the channel is blacked out.

Mr. PYNE. Can I just address very quickly——

Mr. GARDNER. If I could interrupt. Mr. Chairman, I don't know—I am out of time so I don't know. It is up to you if you want the——

Mr. LATTA. If you can finish up in about 30 seconds.

Mr. GARDNER. Yes, so if I could just ask quickly to run through the rest of the panel members, and Mr. Pyne, we can catch up after this, but let's finish with the rest, Mr. Singer and Mr. Manne, if you don't mind quickly? Thank you.

Mr. SINGER. Sure. I don't think allowing broadcasters to be compensated for the signals is what is driving higher prices of the cable packages. I think it is bundling, and you put your finger on that. One of the things that you really haven't put your finger on yet that I just want to draw your attention to is vertical integration. I just released a study on the review of network economics showing that when a regional sports network, an RSN, is owned by a cable operator it charges more than independents, and the premium increases with the downstream market share of the vertically affiliated cable operator. So I just think it is important to focus everyone's attention on what is driving the prices higher, and the fact that broadcasters are allowed to seek compensation for their signals is not one of them.

Mr. GARDNER. Mr. Manne?

Mr. MANNE. It is not vertical integration, either. Vertical integration has been decreasing over the relevant time period, and with all due respect to Hal, we have a pretty substantial disagreement over how much vertical integration can really impact the prices like that. And I don't think it is nearly as substantial as he thinks. I think if there were really a free market, all of these supposed—and very real, actually, benefits from local broadcasters wouldn't need to be mandated by law. The customers and distributors would willingly purchase them, but that may not happen without a particular mandate suggests that it is not, indeed, a free market.

Mr. GARDNER. Mr. Chairman, thank you for your indulgence.

Mr. LATTA. Thank you very much. The gentleman's time has expired, and I just want to thank on behalf of Chairman Walden and also Ranking Member Eshoo and myself for all of your testimony today, and your answers. We really appreciate it. It is very, very informative, and on behalf of the committee, I just again say thank you. Seeing no other questions to come before the committee, this committee stands adjourned.

[Whereupon, at 12:48 p.m., the Subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

PREPARED STATEMENT OF HON. FRED UPTON

Today the Subcommittee on Communications and Technology continues its examination of the law authorizing satellite operators to retransmit broadcast television signals. Portions of the law, first passed a quarter of a century ago, expire at the end of next year.

I think it is an important exercise to be required to periodically examine that law. A lot has changed in the video marketplace since it was first passed in 1988. Satellite television providers are no longer new kids on the block. And cable operators, once the commanding presence in the pay-TV sector, now face competition not just from satellite providers, but phone companies and the Internet as well.

We have a year and a half before we must decide what action to take. Let's use that time to make sure we hear from viewers and stakeholders about the actions we should consider, those we should not, and the implications of both. Today is our

second of what will be a thoughtful series of hearings as we pursue the appropriate policies.

# # #

TENNIS
CHANNEL

Ken Solomon
Chairman & CEO

June 12, 2013

The Honorable Fred Upton
Chair
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Henry A. Waxman
Ranking Member
Committee on Energy & Commerce
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Greg Walden
Chair, Subcommittee on Communications and Technology
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Anna Eshoo
Ranking Member, Subcomm. on Communications and Technology
Committee on Energy & Commerce
U.S. House of Representatives
Washington, D.C. 20510

Dear Chairmen Upton and Walden and Ranking Members Waxman and Eshoo:

The Subcommittee's hearing today is examining the video marketplace and whether changes to our laws are needed to benefit consumers. My company, Tennis Channel, is an independent cable network and while we have no position on the reauthorization of the distant satellite license, we strongly urge the Subcommittee to focus on the larger video marketplace, as Chairman Walden indicated he wanted to do,[1] and in particular examine how consumers are being served, or disserved, by recent developments. It is for this reason that I want to share with the Subcommittee the perspective of a company that offers extraordinary content such as the recent French Open and has an active fan base but has encountered problems in dealing with the vertically integrated cable companies that dominate our video marketplace today.

Who is Tennis Channel?

Tennis Channel is a national sports network that launched on May 15, 2003 and has been recognized by many awards for its outstanding coverage. Tennis Channel offers a broad range of popular year-round tennis and tennis-related programming and has become the leading outlet for

[1] Greg Walden, Chairman, Subcomm. on Commc'ns and Tech., Comm. on Energy and Commerce, U.S. House of Representatives, Address at the 2013 National Association of Broadcasters Show (Apr. 8, 2013) (transcript available at http://energycommerce.house.gov/press-release/walden-delivers-remarks-panels-agenda-nab-show).

DC: 4871826-1

the sport. The network has exclusive rights to telecast portions of three of the four Grand Slam events: the French Open, the Australian Open, and Wimbledon. And in 2009, it added rights to telecast live portions of the fourth Grand Slam, the U.S. Open, as well as other prominent event coverage like exclusive telecasts of every worldwide and United States Davis Cup and Fed Cup match, and today telecasts the top 120 tournaments.

Today, approximately 26 million subscribers receive Tennis Channel from about 130 different distributors nationwide. Although many distributors have discretion regarding their placement of Tennis Channel, the vast majority—more than two thirds—offer Tennis Channel to subscribers without requiring them to purchase a premium sports tier.

Program Carriage Remains Necessary to Promote Competition and Diversity

Independent cable networks like Tennis Channel have a chance to succeed in a world dominated by vertically integrated cable companies—not a right, but a chance—because of the protections that Congress built into the law. In 1992, Congress adopted the program carriage framework in Section 616 of the Communications Act applicable to unaffiliated cable networks. In adopting Section 616's program carriage law, this Committee made clear that it was concerned about important public interest goals—fair competition, diversity, localism—and about countering cable operators' obvious incentives to discriminate in favor of their own affiliated programming. It was understood that independent cable networks could add diversity and competition to the video marketplace that would benefit consumers. When the cable industry challenged the Cable Act, the Supreme Court upheld it because the law served important governmental interests. Indeed, the Court reaffirmed that protection of diverse information sources is a governmental purpose of the highest order, because it promotes core First Amendment values.[2] Moreover, the Court expressly affirmed the clear concern by Congress that increasing market penetration by cable services, as well as the expanding horizontal concentration and vertical integration of cable operators, combined to give cable systems the *incentive and ability* to act in a discriminatory manner against unaffiliated sources of cable programmers.[3]

I want to impress upon the Committee that claims by vertically integrated cable companies that changes in technology and the video distribution marketplace somehow weaken

[2] *Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n*, 512 U.S. 622, 663 (1994) [hereinafter *Turner I*]; *see also id.* at 663–64 ("[I]t has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'") (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n. 27 (1972) (plurality opinion)).

[3] *Turner Broad. Sys., Inc. v. Fed Commc'n Comm'n*, 520 U.S. 180, 197–98 (1997) [hereinafter *Turner II*].

the need for these vital rules—the rules that address the incentive and ability of cable operators to discriminate against competitors such as Tennis Channel—is plain wrong. The rules are in fact more important than ever.

In fairness, my friends in the cable industry are partially right. The market has changed substantially since 1992: it's gotten worse. The biggest cable company today (Comcast) is much bigger than the biggest cable company (TCI) was in 1992. And the biggest cable company today is much more vertically integrated, owning multiple sports networks along with news and entertainment and lifestyle channels, regional sports channels, owned-and-operated broadcast stations in the top markets, and an over-the-air broadcast network as well. At the same time, consumers are just as dependent upon these increasingly concentrated cable operators as they were in 1992. The FCC reports that nearly 90 percent of households with television subscribe to a multichannel video programming distributor ("MVPD") service, and nearly 70 percent of those MVPD subscribers receive programming from a franchised cable operator.[4] That means nearly 60 percent of households with a television subscribe to a cable service. That was precisely the yardstick that this Committee cited, and the Supreme Court relied on, in finding the provisions in the Cable Act were needed.[5]

Industry data also confirm that not only have the big gotten bigger in recent years, the market concentration of the cable industry has grown substantially. The four largest cable operators now have 56.75 percent of the market, a big jump from just ten years before when their market share stood at 34 percent.[6] This shows that the change in the marketplace has driven out smaller, non-vertically integrated cable operators who have lost market share.

It is clear, as the FCC has repeatedly found, that cable operators and other MVPDs have the incentive and ability to favor their affiliated programming vendors in individual cases, with the potential to unreasonably restrain the ability of an unaffiliated cable network like Tennis Channel to compete fairly.[7]

Discriminatory Conduct Harms Independent Networks

For Tennis Channel, this is not just a theoretical concern; illegal discrimination is the company's biggest problem since it blocks us from 20 million homes. In 2010, Tennis Channel brought a program carriage complaint against Comcast at the FCC because we believed that

[4] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd. 542, 546 (2009).

[5] *See Turner I*, 512 U.S. at 633 (noting that "over 60 percent of the households with television sets subscribe to cable").

[6] *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 17791, 17829–30 (2007).

[7] *See In re Revision of the Commission's Program Carriage Rules*, 26 FCC Rcd. 11494, 11518–19 (2011).

Comcast, which is vertically integrated and owns the Golf Channel and what is now NBC Sports, acted to harm competition and in a discriminatory manner by putting the sports channels it owns on a widely distributed tier while putting Tennis Channel, which it competes with for advertisers and viewers, on an entirely different and much less distributed premium tier that costs consumers extra. We brought this complaint because we had great product, award-winning programming, advertisers and viewers that were equal to Golf Channel and superior to NBC Sports, and yet Comcast refused to distribute our channel as broadly as they distributed their own channels, which a Comcast cable distribution executive referred to as "siblings."

The FCC's Media Bureau agreed that we had made a *prima facie* case, and referred the matter to an administrative law judge. After lengthy discovery and depositions, the ALJ conducted a hearing and concluded that we had established that Comcast acted in a discriminatory manner by (a) helping the Golf Channel and NBC Sports because of their affiliation and (b) harming Tennis Channel because it was not affiliated. It bears emphasis that this was the first time an independent cable network had successfully brought a program carriage complaint to the FCC. The full Commission reviewed that decision and upheld it.

Unfortunately, a panel of the D.C. Circuit Court of Appeals has recently voted to overturn the FCC's order. We will seek appropriate review of that decision, which we believe is a miscarriage of justice and an unlawful application of principles of judicial review. Despite ample evidence that Comcast treats the unaffiliated Tennis Channel dramatically worse than it treats its similarly-situated affiliates Golf Channel and NBC Sports Network, the panel found that Comcast did not violate the program carriage rules simply because the FCC failed to find as well that Comcast would have benefitted from carrying Tennis Channel on a more advantageous tier. In doing so, this panel of the court applied a wholly new standard for how a complainant must prove discrimination under Section 616—a standard that is not found in the statute.

Conclusion

The program carriage law is no less important today as a tool to promote competition and diversity in today's video programming marketplace. The statute continues to have a role in ensuring consumers have additional choices and access to diverse programming, and that independent cable networks have a chance to succeed and to act as a check on pricing by vertically integrated cable companies. On behalf of all independent cable networks, I urge you to maintain and strengthen this important competitive safeguard. It is a safeguard that not only promotes economic competition, it also promotes alternative views and thus advances important First Amendment values. Our video marketplace remains concentrated, and we urge the Committee to seek out ways to enable new and independent voices to have a role in the cable marketplace.

Sincerely,

Ken Solomon
Chairman & CEO

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority (202) 225-2927
Minority (202) 225-3641

July 24, 2013

Mr. Mike Palkovic
Executive Vice President, Services and Operations
DIRECTV
901 F Street, N.W., Suite 600
Washington, D.C. 20004

Dear Mr. Palkovic:

Thank you for appearing before the Subcommittee on Communications and Technology on Wednesday, June 12, 2013, to testify at the hearing entitled "The Satellite Television Law: Repeal, Reauthorize, or Revise?"

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Wednesday, August 7, 2013. Your responses should be e-mailed to the Legislative Clerk in Word format at Charlotte.savercool@mail.house.gov and mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

DIRECTV

Andrew Reinsdorf
Senior Vice President
Government Affairs

August 13, 2013

VIA EMAIL AND MAIL DELIVERY

The Honorable Greg Walden
Chairman
House Subcommittee on Communications and Technology
Washington, DC 20515

Dear Chairman Walden,

Attached please find DIRECTV's written responses to the additional questions for the record posed by the members of the House Energy and Commerce Subcommittee on Communications and Technology regarding the hearing held on June 12, 2013, entitled "The Satellite Television Law: Repeal, Reauthorize, or Revise?"

We appreciate the opportunity to respond to the questions.

Sincerely,

Attachment

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

901 F Street, NW, Suite 600, Washington, DC 20004 **Phone:** 202.383.6330 **Fax:** 202.639.0302 **Email:** areinsdorf@directv.com

Additional Questions for the Record

The Honorable Anna Eshoo

1. **You've testified that the number of blackouts resulting from breakdowns in retransmission consent negotiations is increasing. To what do you attribute this troubling trend?**

The increased number of blackouts is established fact. There were 91 blackouts last year. There were only 12 blackouts in 2010, 51 in 2011. This represents a 78% increase from 2011 to 2012 and a 658% increase in two years.

To give you an example of how this plays out for our subscribers, earlier this year every DIRECTV subscriber in Alaska missed the Oscars, with only two days' notice. Vision Alaska owns every ABC affiliate in Alaska. They took down our signal for three days in early January, but then restored it while we were conducting negotiations. On Friday, February 22, with only a few hours' notice, they demanded for the second time that we shut off their ABCs. This was two days before the Oscars on Sunday, February 24.

This dramatic increase in blackouts stems from the unique economics of retransmission consent. Retransmission consent negotiations do not occur in a real marketplace. The retransmission consent "market" was put in place by the government back when there were two monopolies – cable and broadcasters – negotiating against each other.

Today, broadcasters have kept their monopolies over network content. If you want to get network programming in a particular market, the only place you can go is to the local broadcaster. This no longer holds true, however, on the distribution side. Cable operators today now compete against satellite, telcos, and sometimes overbuilders. This shift in the balance of power has harmed consumers through blackouts and higher prices. So retransmission consent is the only "market" in which more competition has led to higher prices.

<u>The Honorable Henry Waxman</u>

1. **What is your perspective on access to sports programming?**

2. **Are the costs associated with these must-have events affecting the prices you charge your customers?**

DIRECTV has long been concerned with access to sports programming, especially regional sports programming. This is why DIRECTV has been one of the most vocal supporters of Congress's "program access" rules over the years. These rules seek to prevent big cable operators that own sports networks from using this must-have programming to harm rivals such as DIRECTV. The FCC has recently moved to weaken these rules, and Congress should monitor the situation closely.

DIRECTV is even more concerned, however, with abuses by broadcasters—who, after all, still control the Super Bowl, the World Series, and other marquee sports events. Problems with broadcasting have become worse than those in other sectors of the video industry in recent years, because only broadcasting is subject to a hodgepodge of outdated laws and regulation.

As we described in our testimony, these rules are in part responsible for the fact that broadcast programming is:

- *Increasingly expensive.*
- *Often unavailable in the place and on the device of the viewer's choosing.*
- *Often "bundled" with programming the viewer doesn't want, in packages the viewer doesn't want.*
- *Increasingly blacked out by the broadcaster.*

To the extent Congress is concerned about the access to and cost of sports programming, it can best address these issues through retransmission consent reform.

The Honorable Mike Doyle

1. **What are the technical or legal limitations that prevent video providers in the United States from offering DVR services that automatically record live events from beginning to end regardless of whether the event is extended due delays or overtime?**

    The limitations are principally technical. DIRECTV, like all other pay-TV providers, receives program information from third-party providers. We use this information to "populate" our programming guide, which in turn governs DVR recordings. Our guide information is updated several times per day. But today's technology does not allow us to update the guide in real-time. (To the extent changes in live events are captured in the periodic updates, those changes are reflected in subscriber recordings.)

    Our DVRs do, however, permit subscribers to adjust recordings, by starting them earlier and ending them up to three hours later. Moreover, since live events such as sports often run late, many of our DVRs automatically ask subscribers if they would like to extend recordings of live events.

2. **During the NHL playoffs, games went into single, double, and triple overtime. Viewers that time shifted these games largely had to guess when they would end. I understand that video providers in Europe receive real-time flagging information from content providers that alert DVR systems to the start and end of programming, what impediments prevent a similar system from being widely deployed in the United States?**

    We are unaware of systems today with real-time flagging of programs that extend beyond their scheduled duration. For this reason, we cannot assess what changes might be required to DIRECTV's system to implement such a hypothetical solution, nor the cost of such changes. We would point out, however, that each pay-TV provider employs its own unique system architecture. Thus, solutions that might work for one provider might not work for another.

3. **What can Congress or the FCC do to help enable this functionality?**

    As this is principally a technical issue rather than a legal one, Congress and the FCC would have limited roles in enabling such functionality. As technology advances in the coming years, we expect additional solutions to be developed. At this early stage, however, Congressional or FCC action might inadvertently <u>preclude</u> innovative solutions by mandating particular technologies or functionalities.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

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Minority (202) 225-3641

July 24, 2013

Ms. Marci Burdick
Senior Vice President of Broadcasting
Schurz Communications, Inc.
1301 E. Douglas Road
Mishawaka, IN 46545

Dear Ms. Burdick:

Thank you for appearing before the Subcommittee on Communications and Technology on Wednesday, June 12, 2013, to testify at the hearing entitled "The Satellite Television Law: Repeal, Reauthorize, or Revise?"

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Wednesday, August 7, 2013. Your responses should be e-mailed to the Legislative Clerk in Word format at Charlotte.savercool@mail.house.gov and mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Responses from Marci Burdick to questions submitted subsequent to the June 12, 2013 hearing entitled, "The Satellite Television Law: Repeal, Reauthorize, or Revise?"

To the Honorable Anna Eshoo:

1. **Your company is a member of the Mobile500 Alliance, a group that promotes "mobile DTV." I think that the service offers consumers many benefits, including not needing a wireless data plan or requiring a monthly subscription. However, it has been several years since mobile DTV devices were first unveiled but the service has not been widely launched. What do you think are the barriers to widespread adoption by both broadcasters and consumers? Do you think consumers are willing to make this investment when they can easily stream Internet-based video using their existing mobile devices?**

TV broadcasters generally, and my company specifically, are still very excited about the prospects for mobile DTV. And while the launch of a ubiquitous service has been slower than many of us would like, we have made significant strides in the last year and we are receiving encouraging signs from the marketplace. As you note, mobile DTV offers consumers a very attractive alternative to Internet-based content on your phone. It is currently free to access, includes compelling broadcast content, and it does not chew through your monthly data allotment the way that watching Netflix or YouTube might. One of the most important benefits of mobile DTV is the ability to access emergency information when you need it – and not just a text that tells you to access local media when a storm is bearing down on your community. Mobile DTV *is the media*, and it is available even when wireless broadband networks crash as they do when usage massively spikes during a crisis, like they did during the Boston Marathon bombings or the Oklahoma tornados. Mobile DTV may not be the first feature you look for in a smartphone, but during an emergency, it may be the most important feature you have.

There are no hard barriers to more widespread usage but market forces move at their own pace. Smartphone manufacturers take their design cues from the needs and desires of the wireless companies. Those wireless companies do not have clear economic incentives to include mobile DTV on smartphones because more eyeballs on mobile DTV equals fewer of their customers using data-hungry video applications. And as the trend toward metered data pricing makes clear, wireless companies see America's addiction to data-chomping applications as a financial windfall. Without some kind of a forcing function the rollout of mobile DTV is likely to continue in incremental fashion. Many broadcasters are broadcasting mobile DTV service across the country and more are joining them. It is there to be viewed. Getting mobile DTV enabled in in more consumer smart phones would significantly accelerate the consumer adoption process.

2. **Last month, Senator Gordon Smith, President and CEO of the NAB said in response to a question by Senator Warner that the Constitution includes protection for copyright. He went on to say, "If you have copyrighted material, rights go with that, that deserve compensation when others use it." Do you agree with Senator Smith that copyrighted material deserves compensation? If so, shouldn't radio fairly compensate artists for the use of their copyrighted material?**

For decades, record labels and artists have received compensation for their works through the unparalleled value of radio airplay. Labels and performing artists profit from the free exposure provided by radio airplay, as well as from on-air interviews and promotions of local concerts and new albums.

Because broadcast radio is the primary promotional vehicle for music, the recording industry invests money promoting songs in order to garner radio airplay, and receives revenues when audiences like and purchase the music they hear. Artists consistently recognize the fact that radio airplay is invaluable, both for new artists and established artists with classic hits. The fact that record labels and artists are compensated through the tremendous value of radio airplay is one of the many reasons Congress has repeatedly refused to institute a performance tax that would alter the fundamental nature of the long-standing, symbiotic relationship between the music and radio industries.

To the Honorable Mike Doyle

1. **What are the technical or legal limitations that prevent video providers in the United States from offering DVR services that automatically record live events from beginning to end regardless of whether the event is extended due to delays or overtime?**

While this is not an issue that NAB or my company has been actively working on, it is clear that an overhaul of DVR functionality would require a multi-industry effort involving broadcasters, cable companies, satellite companies, consumer electronics manufacturers, and the companies that provide programming guide data to multichannel video programming distributors. Program guide information for DVRs in this country is compiled and distributed by third parties; it does not come directly from broadcasters. My understanding is that it takes significant time (an hour or more at least) for submitted schedule changes from a broadcaster to propagate through the system and be delivered to user devices. So, while broadcasters may be able to provide up to date timing information, the overall system that feeds DVRs is not responsive in anything near real time.

2. **During the NHL playoffs, games went into single, double, and triple overtime. Viewers that time shifted these games largely had to guess when they would end. I understand that video providers in Europe receive real-time flagging information from content providers that alert DVR systems to the start and end of programming, what impediments prevent a similar system from being widely deployed in the United States?**

The European experience is different than the American experience for many reasons. Europe uses a different technical system and the business relationships between the various parts of the delivery chain are different as well.

3. **What can Congress or the FCC do to help enable this functionality?**

Unlike other countries, with limited exceptions, DVRs in this country are not regulated. For Congress or the FCC to help enable this functionality they would have to convince or require the broadcasters, cable companies, satellite companies, consumer electronics manufacturers, and the companies that provide programming guide data to multichannel video programming distributors to change the technical standards in current use so that program information could be delivered and implemented in real time.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225-2927
Minority (202) 225-3641

July 24, 2013

Mr. Ben Pyne
President, Global Distribution
Disney Media Networks
Walt Disney Company
500 South Buena Vista Street
Burbank, CA 91521

Dear Mr. Pyne:

Thank you for appearing before the Subcommittee on Communications and Technology on Wednesday, June 12, 2013, to testify at the hearing entitled "The Satellite Television Law: Repeal, Reauthorize, or Revise?"

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

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Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

The Walt Disney Company

Bill Bailey
Vice President
Government Relations

August 2, 2013

Ms. Charlotte Savercool
Legislative Clerk
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Ms. Savercool,

On June 12, 2013, Ben Pyne, President, Global Distribution, Disney Media Networks, testified before your committee. On July 24, 2013, Chairman Walden sent Mr. Pyne several Questions for the Record (QFRs). Attached are Ben Pyne's responses to the QFRs.

Please call me if you have any questions.

Sincerely,

Bill Bailey

Attachments (5)

425 3rd Street, S.W., Suite 1100, Washington, DC 20024
Tel 202 222 4760 Fax 202 222 4799

The Honorable Mike Doyle

1. **What are the technical or legal limitations that prevent video providers in the United States from offering DVR services that automatically record live events from beginning to end regardless of whether the event is extended due delays or overtime?**

   In the context of the multichannel video market, the Walt Disney Company is a broadcaster and a programmer. We are not currently in the business of selling either DVR equipment or service.

2. **During the NHL playoffs, games went into single, double, and triple overtime. Viewers that time shifted these games largely had to guess when they would end. I understand that video providers in Europe receive real-time flagging information from content providers that alert DVR systems to the start and end of programming, what impediments prevent a similar system from being widely deployed in the United States?**

   Please see our response to Question 1.

3. **What can Congress or the FCC do to help enable this functionality?**

   We believe any discussion of real-time flagging functionality is best left to the marketplace.

4. **I understand that you testified that although Disney never "tied" products, it did offer popular and less popular networks in "packages." I am not sure I fully understand the difference and thus I would like to receive at your earliest convenience a copy of Disney's rate card showing all of the prices its networks, including the card that shows the prices for the packages that you mentioned. Please indicate which networks are available for individual purchase without the necessity of licensing or obtaining retransmission consent for any other network or station, and the rate payable when the network is purchased individually, or the range of rates if volume discounts apply.**

   The Walt Disney Company does not engage in anticompetitive tying arrangements. Given the competitively sensitive nature of our pricing information, I am not able to share it. I have executed three sworn affidavits in the past attesting that "Disney offers retransmission rights to each of its ABC-owned broadcast stations for standalone cash payments" and that "Disney does not require carriage of any of its cable programming services as a condition to retransmission rights to its ABC-owned television stations." I further attested that "Disney does not require carriage of any of its other programming services as a condition to carriage of its two most popular cable channels: ESPN and Disney Channel." I am attaching a copy of each of these affidavits to this response.

DECLARATION OF BENJAMIN N. PYNE

I, Benjamin N. Pyne, President, Global Distribution, Disney Media Networks, have responsibility for negotiating for multi-channel video programming distributor ("MVPD") carriage of the ten ABC-owned television stations and The Walt Disney Company's cable networks, including ESPN, ESPN2, ESPN Classic, ESPNEWS, ESPN Deportes, ESPNU, Disney Channel, Toon Disney, ABC Family and SOAPnet.

I attest that Disney negotiates retransmission consent only on behalf of the ten ABC-owned television stations and distribution deals only on behalf of The Walt Disney Company's cable networks, including ESPN, ESPN2, ESPN Classic, ESPNEWS, ESPN Deportes, ESPNU, Disney Channel, Toon Disney, ABC Family and SOAPnet.

Disney has no authority to negotiate for, and does not negotiate for, carriage of the signals of the ABC affiliates it does not own or control on any distribution platform and the affiliates have no authority to negotiate for, and do not negotiate for, carriage of any Disney-owned cable network.

In negotiating for MVPD carriage for the ABC-owned television stations and The Walt Disney Company's cable networks:

- Disney offers retransmission rights to each of its ABC-owned broadcast stations for standalone cash payments. Disney does not require carriage of any of its cable programming services as a condition to retransmission rights to its ABC-owned television stations.

- Disney does not require carriage of any of its other programming services as a condition to carriage of its two most popular cable channels: ESPN and Disney Channel. Any MVPD who wishes to carry Disney Channel or ESPN without carrying other Disney programming services may elect to do so at a standalone rate that reflects the market value of those channels on a stand alone basis.

- The only Disney cable networks that are not available on a stand-alone basis are complementary ESPN services, such as ESPNEWS and ESPN2, which have never been intended to be offered to MVPDs or subscribers without the flagship ESPN channel.

- Disney offers package discounts to MVPDs who agree to carry multiple channels in order to gain broader carriage for those services. Many MVPDs take advantage of Disney's packaged offerings.

- For small cable operators, Disney negotiates cable carriage arrangements through the National Cable Television Cooperative, Inc. ("NCTC"). Disney's arrangements with NCTC benefit approximately 1,065 operators with an aggregate subscribership of approximately 8 million subscribers.

[Signature on Next Page]

I hereby declare, under penalty of perjury, that, to the best of my knowledge, information and belief, all of the factual information contained herein is accurate and complete.

Benjamin N. Pyne
President, Global Distribution,
Disney Media Networks

January 3, 2008

DECLARATION OF BENJAMIN N. PYNE

I, Benjamin N. Pyne, Executive Vice President, Disney and ESPN Networks Affiliate Sales and Marketing, have responsibility for negotiating for multi-channel video programming distributor ("MVPD") carriage of the ABC owned television stations and The Walt Disney Company's cable networks, including ESPN, ESPN2, ESPN Classic, ESPNEWS, Disney Channel, Toon Disney, ABC Family and SOAPnet.

I attest that, in negotiating for MVPD carriage:

- Disney does not require carriage of its cable programming services in exchange for its consent to carriage of its ABC-owned television stations;
- Disney offers carriage of its ABC-owned broadcast stations for standalone cash payments;
- Disney does not require carriage of any of its other programming services before it will permit carriage of Disney Channel;
- ESPN offers the opportunity for any MVPD to carry only the ESPN service;
- ESPN does not require carriage of any of its other programming services before it will permit carriage of the ESPN service;
- An MVPD who wishes to carry Disney Channel or ESPN without carrying other Disney programming services may elect to do so;
- Disney offers MVPDs significant flexibility to choose the manner in which they carry its many services;
- MVPDs may negotiate for carriage of ESPN2 and ESPN Classic on the first, second or third most widely-penetrated tier;
- Disney negotiates for carriage of ESPN, Disney Channel and ABC Family on either the first or second most widely-penetrated tier of service;
- ESPNEWS, Toon Disney and SOAPnet are available to be carried on any tier;
- Disney offers all of its most popular programming services—ABC, ESPN and Disney Channel—on a standalone basis;
- An MVPD may carry ESPN but not ESPN2; and
- An MVPD may carry ABC but not SOAPnet.

I hereby declare, under penalty of perjury, that, to the best of my knowledge, information and belief, all of the factual information contained herein is accurate and complete.

Benjamin N. Pyne
Executive Vice President, Disney and ESPN
Networks Affiliate Sales and Marketing

August 13, 2004

EXHIBIT A

DECLARATION OF BEN PYNE

I am Senior Vice President of Affiliate Sales and Marketing for ABC Cable Networks Group. Among other responsibilities, I am responsible for working with the ABC owned television stations to negotiate retransmission agreements for the ten ABC owned television stations.

I attest that, in negotiating for retransmission consent, ABC offers MVPDs a cash stand-alone price for retransmission consent for the ABC owned stations. If the cable operator accepts that offer, that decision results in no additional obligation to carry any Disney/ABC programming. To the extent that any given MVPD decides not to accept ABC's stand-alone cash offer, and instead elects the alternative to negotiate to carry programming, that decision is made by the individual MVPD. We attempt to work with the MVPD to customize a reasonable offer to address their particular needs.

I hereby declare, under penalty of perjury, that, to the best of my knowledge, information, and belief, all of the factual information contained in this Declaration is accurate and complete.

Benjamin N. Pyne
Senior Vice President of Affiliate
Sales and Marketing
ABC Cable Networks Group

February 3, 2003

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority (202) 225-2927
Minority (202) 225-3641

July 24, 2013

Ms. Amy Tykeson
President and CEO
BendBroadband
63090 Sherman Road
Bend, OR 97701

Dear Ms. Tykeson:

Thank you for appearing before the Subcommittee on Communications and Technology on Wednesday, June 12, 2013, to testify at the hearing entitled "The Satellite Television Law: Repeal, Reauthorize, or Revise?"

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

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Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Additional Questions for the Record

The Honorable Henry Waxman

1. What is your perspective on access to sports programming?

2. Are the costs associated with these must-have events affecting the prices you charge your customers?

Combined response to questions 1 and 2:

Consumers have access to more televised sports programming than ever before. However, this increased access comes at a cost to consumers, particularly those that are not interested in sports.

BendBroadband currently offers 26 channels (20 in high definition) that are oriented on a full-time basis towards competitive and/or recreational sports. We also offer a number of channels that feature sports on a part-time basis, including the four major broadcast television networks, TNT, and TBS. Sports programming is among the most expensive programming that we carry and while we have a robust optional "sports tier," more than half of the full-time sports channels that we carry must be included on our most widely-penetrated tiers – because of requirements by the programmers. This means that many subscribers who have little or no interest in sports are bearing a portion of the system's sports programming costs.

In addition, sports programming that historically was available on broadcast television stations continues to migrate to cable networks. Examples include Monday Night Football, the US Open Tennis Tournament, the British Open Golf Tournament, Big Ten college football and basketball, and certain Major League Baseball playoff games. The finals of the NCAA Men's' Basketball Tournament and most of the major NCAA post-season bowl games have moved or will be moving from broadcast to cable networks as well. The migration of this sports programming drives up the cost of those networks to MVPD's like BendBroadband and their customers. Moreover, the broadcast channels that have lost this expensive programming have not responded by lowering their demands for retransmission consent fees. To the contrary, the demands for retransmission consent increases are doubling and tripling while the high priced sports programming is moving to cable networks. As a result, our customers are hit with a double whammy. The cost of all programming -- and sports in particular--is increasing faster than at any other time in my 30 year career. Customers are stuck paying for channels they don't want. Onerous terms by programmers require MVPDs to take all their channels and package them to maximize their bottom line instead of advancing consumer preferences.

The Honorable Mike Doyle

1. What are the technical or legal limitations that prevent video providers in the United States from offering DVR services that automatically record live events from beginning to end regardless of whether the event is extended due to delays or overtime?

2. During the NHL playoffs, games went into single, double, and triple overtime. Viewers that time shifted these games largely had to guess when they would end. I understand video providers in Europe receive real-time flagging information from content providers that alert DVR systems to the start and end of programming, what impediments prevent a similar system from being widely deployed in the United States?

3. What can Congress or the FCC do to help enable this functionality?

Combined response to questions 1-3:

While I am neither an attorney nor an engineer, it is my understanding that there are no legal impediments preventing DVR services in the United States from automatically extending the recording of live television events and that deploying this functionality is technically feasible, although it likely would add to the cost that consumers pay for service.

Specifically, a recently published article (available at http://www.slate.com/articles/arts/culturebox/2013/06/accurate_recording_the_one_amazing_feature_that_makes_european_dvrs_so_much.html) indicates that television programmers in a number of other countries encode their signals with program-specific "flags" that inform the DVR when a particular program has ended and another program has begun. While it appears that some DVRs in the United States are capable of reading such "flags," I have not seen any research indicating how many devices have the capability of reading signaling "flags" if they were included by the programmer. BendBroadband's technical team believes most, if not all, of our DVR's have the capability but we have not been able to test it.

In addition, deploying a system such as that used in other countries to ensure complete recording of live events would require the cooperation of the programmers and, as the article indicates, programmers have an inherent interest in encouraging viewers to watch television on a live, rather than recorded, basis so that advertising is not skipped over. So, in addition to any equipment-related costs, the cost of deploying a system that automatically ensured complete recording of live events probably would include increased demands for compensation from the programmers to offset any advertising losses that might occur or other costs associated with inserting the "flags" in the programming stream.

As a practical matter, we rarely receive complaints from our DVR customers about this issue. Given the costs that would be associated with the deployment of an extended recording system, I think that the government should look to the marketplace, rather than regulation, to address this matter.

The Honorable Jim Matheson

1. You mentioned in your testimony that retransmission consent fees have increased the last few years. Roughly, what percentage of an average customer's cable bill is spent of video programming costs?

2. What percentage of those programming costs are attributable to broadcast programming?

Combined response to questions 1 and 2:

The contents of a cable systems video service offerings (including which channels are offered and how they are packaged) varies from one distributor to the next. Indeed, as the FCC recognized in its recently released *Fifteenth Annual Video Competition Report*, "[e]ven where the number of channels [in a package] is similar, each package contains a different mix of channels." Because there is "no standard video package for making direct price comparisons," it is not possible to calculate the portion of an "average customer's" bill attributable to video programming costs.

However, what is clear is that annual increases in video programming costs are outpacing increases in revenues for video service. A 2012 report by SNL Kagan looked at several major cable operators' results for the previous year and determined that the percentage increase in programming costs was as much as three times the percentage increase in average monthly revenue per unit (ARPU) from video service and that, even in absolute dollar terms, most operators—including BendBroadband-- are seeing their per subscriber programming costs rise by a greater amount than their per subscriber video revenues.

Programming costs include not only retransmission consent fees, but fees for non-broadcast cable networks. As I mentioned in my testimony, from 2006 to 2012, retransmission consent fees grew from $215 million to $2.4 *billion* – an increase of over 1000 percent. Moreover, retransmission consent fees are expected to more than double from their current level by 2018. Retransmission consent fees undoubtedly play a significant role in the spiraling cost of programming. It is important to note that the major broadcast networks own 60 percent of the non-broadcast cable networks. Onerous terms and conditions, such as tying and bundling, packaging requirements, forced launches of new channels and aggressive fee increases are standard fare—all of this adds up to higher prices and less choice for customers.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225–2927
Minority (202) 225–3641

July 24, 2013

Mr. Hal Singer
Managing Director and Principal
Navigant Economics
1200 19th Street, N.W., Suite 850
Washington, D.C. 20036

Dear Mr. Singer:

Thank you for appearing before the Subcommittee on Communications and Technology on Wednesday, June 12, 2013, to testify at the hearing entitled "The Satellite Television Law: Repeal, Reauthorize, or Revise?"

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Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

RE: SINGER QUESTIONS FOR THE RECORD

Dear Mr. Walden:

It is an honor to have the opportunity to inform Congress on such important matters in the communications industry. My answers to your questions are provided below. Please let me know if I can be of further assistance.

Thanks,

Hal J. Singer

***

The Honorable Anna Eshoo asks: "As you know, Senator McCain recently introduced '*a la carte*' legislation to ensure consumers only have to buy those channels they want to watch. What is your view on Senator McCain's legislation and would it incent distributors to carry more independent programming?"

Although I am sympathetic to the problem that Senator McCain's legislation aims to address—bloated cable packages that ask consumers to pay for much content they never watch—I fear that an *ex ante* prohibition on wholesale and retail bundling ("mandatory unbundling") is not the right approach. Mandatory unbundling could raise programming costs to cable providers, who likely would pass these higher costs on to their consumers. It could also undermine the "flat tax" imposed on video households that supports "a diverse and thriving entertainment business without asking any group to pay too much for what they want." Below, I propose a few alternatives that would reduce the size of the cable package and promote video competition generally, including an *ex post* method for adjudicating wholesale-bundling disputes.

Online video offerings by Google, Netflix, Apple, and Amazon will likely force cable operators to pare back the size of their bundles. Price-sensitive customers can avoid the standard video offering by pairing a high-speed Internet connection with an online video subscription. This is not to say that online video has disciplined cable prices, as that would require cable customers to "cut the cord" with much greater frequency. According to Leichtman Research Group, in 2012 only 0.4 percent of U.S. households canceled their pay-television subscriptions in favor of getting video entertainment over the Internet.

Rather than mandating that cable operators react to these market forces with smaller packages of their own, I would look for ways to accelerate cord cutting. In particular, Congress should

investigate the use of the following provisions in program-carriage agreements, which are likely designed to deny online video providers access to video programming: (1) exclusivity provisions that bar the supply of programming to online video providers; (2) higher license fees conditioned on a refusal to deal with online video providers; or (3) most-favored-nation (MFN) provisions. With respect to the latter, a program owner seeking to contract with an online distributor at a reduced license fee (relative to what it charges cable operators) might have to reimburse a cable operator for the difference in its license fee pursuant to an MFN, thereby thwarting such distribution arrangements.

Although fostering video competition is the best long-run approach, I acknowledge that there is a serious coordination problem among programmers and cable operators that prevents cable operators from paring down their packages in the short term. Programmers enjoy the benefits of generous license fees—even when few viewers are watching their network. And cable operators recognize that programmers could render their video services irrelevant by contracting with online distributors or even viewers directly. Moreover, much like the well-recognized "holdup problem" when several patents cover minor features of a single product, no individual programmer internalizes the cost of the cable bundle being too expensive, and therefore insists on maximum penetration, not only for its marquee content, but also for its less-compelling, sister networks.

How bloated will the cable package get before cable operators push back on programming bundlers? Cable operators have some recourse against wholesale bundling in courts, as evidenced by Cablevision's antitrust suit against Viacom. Yet antitrust litigation moves slowly and imposes a market-power requirement that might be impossible to satisfy for most bundling claims, as there are only a handful of cable networks with significant market power.

Accordingly, a less-restrictive "nudge" toward smaller cable packages could be in order. One idea would be for Congress to empower the FCC to adjudicate wholesale-bundling disputes between a cable operator and a programming owner. The FCC could investigate these complaints pursuant to a public-interest standard (as opposed to an antitrust standard). For example, the factfinder could seek to determine whether the "standalone price" for the most popular network in the bundle (that is, the price at which the program owner is willing to sell the network by itself) exceeds the price that would be charged by an independent owner of that network; if so, then the bundle likely reduces consumer welfare.

However, if a cable operator invoked such protection, it should be required to offer the networks in dispute *a la carte* to its customers *conditional on prevailing on the merits of its claims*—that is, there should be a cost to cable operators for invoking this regulatory protection. For example, if Cablevision were to invoke this new protection against Viacom, and if an administrative law judge at the FCC were to rule that Cablevision could purchase Viacom's

networks separately, then Cablevision would be compelled to permit its customers to add Viacom's networks *a la carte* to any package offered by Cablevision, including its base package.

Perhaps this "voluntary" form of regulation could upset the current equilibrium and set in motion what Senator McCain really wants—smaller cable packages. Mandatory unbundling seems to be a bit heavy-handed and could affect independent cable networks in ambiguous ways. Under an *ex ante* prohibition on retail bundling, independent programmers could be exposed to less carriage (if customers never learn of their offerings) or more carriage (if cable operators cut loose the "tied" programming from bundlers to make room for more independents); it is hard to know which force is greater. In contrast, independent programmers that refrain from bundling would largely be unaffected under my alternative, which would bring about *a la carte* incrementally and on a voluntary basis.

The Honorable Henry Waxman asks: "I remain concerned about the challenges facing independent programmers as well as competition amongst distributors. How do you assess the changes in the video marketplace since the 1992 Cable Act? Have these changes resulted in the kind of diversity and competition Congress sought to foster for video? How would you respond to the argument that because only 14 percent of the networks available for distribution today are vertically integrated, the program access and program carriage rules are no longer needed?"

Within a representative *local* market, cable's market share has declined from roughly 91 percent in 1995 (the earliest available data on the FCC's website) to 59 percent as of 2010 (the latest available data on the FCC's website). In this sense, one of the primary goals of the Cable Act has been largely fulfilled. However, the bargaining position of *national* cable networks depends on, among other things, concentration at the *national* level. In their seminal book on vertical integration in cable programming, Professors Waterman and Weiss explain how foreclosure from even a small share of nationwide U.S. households could impair an independent network's ability to realize scale economies and compete effectively for advertisers and content.

Two major trends have happened since 1992 that push horizontal concentration among video distributors at a national level in opposite directions: (1) inroads by DBS (after securing access to broadcast networks) and telcos, and (2) the clustering of adjacent cable systems by cable operators. The former has reduced concentration (particularly in local markets where telcos have entered), while the latter has increased concentration nationwide. In 1992, the cable operator with the largest nationwide share of video subscribers was TCI with a roughly 18 percent share; by 2010, the cable operator with the largest nationwide share of video

subscribers was Comcast with a roughly 23 percent share. In this sense, the bargaining position of national cable networks vis-à-vis the largest cable operator has *slightly deteriorated* since 1992.

Yet some who do not understand these dynamics (including one judge on the D.C. Circuit Court of Appeals) cite Comcast's *nationwide share* as a basis for dismantling the program-carriage rules and relying instead on antitrust courts. Under this logic, Congress sought to immunize all vertically integrated cable operators from the program-carriage rules when it passed the 1992 Cable Act—an absurd proposition. Should the D.C. Circuit's recent *Tennis Channel* decision stand, Congress will have to revisit the program-carriage rules, which have been effectively gutted by the new evidentiary standard. Asking an independent network to estimate the lost subscription revenues from a cable operator's not carrying that network more broadly is akin to asking an oyster vendor to estimate the lost sales receipts from a restaurant's not carrying oysters on the buffet; few customers are willing to switch cable operators (restaurants) from not being able to access one of hundreds of items on the dial (buffet).

Whether Comcast's nationwide market share would satisfy the requisite "foreclosure share" under the antitrust laws is an open question. Fortunately, it is a purely academic one, as Congress understood in 1992 that the program-carriage rules were designed to foster something clearly beyond the scope of antitrust—namely, programming diversity. And those rules still have an important role to play, as many independent networks such as Tennis Channel or MASN must vie for carriage by a vertically integrated cable operator that either possesses a similarly situated network or seeks to own the underlying rights of the independent network (or both). So long as fostering diversity in programming is still an important objective, there is no empirical basis to dismantle the program-carriage rules.

Although they are often perceived as two sides of the same coin, program carriage and program access are different animals. In particular, program access is designed to protect against a price increase by an affiliated cable network aimed at raising a rival's costs, which fits squarely within the scope of antitrust enforcement. Here, the FCC has been tasked with policing program access because it arguably can resolve these disputes faster than antitrust courts.

Economic theory shows that a vertically integrated cable network will raise its license fee relative to an independent network (carrying the same content) so long as withholding said content from a rival could induce some of the rival's customers to depart. Stated differently, program access is only a concern for "must-have" networks; setting aside bundled-pricing arrangements, there is no incentive to raise the price of a non-essential affiliated network over and above the price that would be charged by an independent owner.

Accordingly, that "only 14 percent of the networks available for distribution today are vertically integrated" is a largely irrelevant statistic. What matters instead is the share of must-have networks that are vertically integrated. According to paper in Review of Network Economics, over the past decade, nearly three-quarters of all regional sports networks ("RSNs")—which carry must-have, local sports programming—were vertically integrated. Moreover, vertically integrated RSNs were shown to charge higher license fees than independent RSNs.

Unlike program-carriage rules, which were designed to address an issue (diversity) clearly outside the scope of antitrust, if program access rules were eliminated, rival distributors could seek recourse under the antitrust laws, albeit at a snail's pace. This fallback makes program-access rules *relatively* less critical than program-carriage rules. However, because the FCC is better positioned to adjudicate these program-access disputes, and because many must-have networks are vertically integrated, there is no good reason to dismantle the program-access rules.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

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July 24, 2013

Mr. Geoffrey Manne
Senior Fellow
TechFreedom
International Center for Law and Economics
4850 S.W. Scholls Ferry Road, Suite 102
Portland, OR 97225

Dear Mr. Manne:

Thank you for appearing before the Subcommittee on Communications and Technology on Wednesday, June 12, 2013, to testify at the hearing entitled "The Satellite Television Law: Repeal, Reauthorize, or Revise?"

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Wednesday, August 7, 2013. Your responses should be e-mailed to the Legislative Clerk in Word format at Charlotte.savercool@mail.house.gov and mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Responses to Questions for the Record of

Geoffrey A. Manne
Lecturer in Law, Lewis & Clark Law School
Executive Director, International Center for Law & Economics
Senior Fellow, TechFreedom

on

The Satellite Television Law: Repeal, Reauthorize, or Revise?

Hearing of the Subcommittee on Communications and Technology
Energy & Commerce Committee
United States House of Representatives
June 12, 2013

The Honorable John Shimkus

1. **Your prepared testimony discussed program carriage issues generally and the DC Circuit's recent ruling in the Tennis Channel case specifically. The Subcommittee received a letter on this subject (copy attached) from Tennis Channel's Chairman and CEO. Does that letter change your thinking on this issue or are there any points you wish to make in response?**

While I am not steeped in the facts of the case, I note that the unanimous panel decision provides a clear and unequivocal statement that "the Commission has nothing to refute Comcast's contention that its rejection of Tennis Channel's proposal was simply a 'straight-up financial analysis...,'" where Comcast reasonably determined that it made no sense to incur the massive additional costs of shifting the channel off of the sports tier. Plus, the concurring opinions of Judges Kavanaugh and Edwards show that there were other good reasons to reject Tennis Channel's claims.

In today's video market consumers have a variety of MVPD choices and, critically, can get much of the content they want from OVDs, either instead of an MVPD subscription or in addition to it. As I noted in my prepared testimony, in a competitive content market with uncertain investments, high fixed costs and extreme product differentiation, there is no reason why discrimination against competing content shouldn't *itself* be considered a valid business decision, unless, perhaps, such discrimination actually prevents unaffiliated content providers from reaching minimum viable scale.

But given that Comcast *did not* simply refuse carriage but rather carried Tennis Channel on a programming tier with smaller penetration, and given the strong evidence that carriage by

Comcast on any tier (let alone the higher-penetrated tier) was not essential to Tennis Channel's survival, this would be extremely difficult to prove. At minimum, it is clear that Tennis Channel was unable to prove this to the court. I can't see much value in the government spending its resources second-guessing a unanimous court decision holding that a cable company made a prudent editorial and business decision in this very competitive market.

In support of my responses and to assist the Subcommittee in assessing these issues, I am attaching to these responses and for entry in the record the D.C. Circuit's decision in the *Tennis Channel* case.

2. **Dr. Singer suggests that a complainant in a program carriage case should not have to demonstrate that the distributor would have obtained any benefit from granting the requested carriage. What is your view on that position? Please explain.**

Dr. Singer's argument does not make economic sense from the standpoint of a distributor. Take what happened between Tennis Channel and Comcast as an example. They had agreed on a contract that entitled Comcast to carry Tennis Channel on the sports tier. According to the D.C. Circuit opinion, it's undisputed that shifting Tennis Channel to a more highly penetrated tier would have caused Comcast's payments to Tennis Channel (i.e., its costs) to rise enormously, so it would be economically irrational to expect Comcast to agree to that change unless it would receive some corresponding benefit. Absent evidence of such a benefit–and the D.C. Circuit said there was no such evidence in the record–it made perfect economic sense for Comcast to decline, and neither Section 616 nor common sense suggests we should penalize such conduct. It's of questionable value for the government to be in the business of second-guessing program carriage decisions to begin with, but it makes no sense for program carriage regulation to infer "discrimination on the basis of affiliation" from normal marketplace behavior.

Moreover, Section 616 prohibits only conduct that *unreasonably restrains* the ability of a programming vendor to compete. Basic principles of antitrust doctrine, clearly contemplated by Congress in adopting that language, require a showing of actual foreclosure and anticompetitive economic effect. To ignore these limitations on an unaffiliated programmer's ability to demand unrestrained access to a distributor's network would be to convert Section 616 to a simple mandatory access regime. The law should not—and, as it's written, does not—restrict economic activity that is far more likely pro-competitive than not.

3. **Dr. Singer's testimony articulated a number of concerns about vertical integration in the cable industry. What insights does the DC Circuit's recent Tennis Channel decision yield on this issue?**

The main takeaway from the D.C. Circuit decision is that, once again, claims that vertical integration is harmful have been found to be completely unsubstantiated. Economists are

famous for not agreeing on much, but there is remarkable agreement in the field about the benefits of vertical integration. Time and again both theory and empirical evidence demonstrate that vertical integration is generally pro-competitive, and for good reason. By integrating, a firm can reduce risk; minimize *ex ante* costs from content negotiation, as well as *ex post* costs from monitoring; and overcome disparate marketing incentives between content owners and distributors.

As the most thorough canvassing of the empirical literature on vertical integration concludes:

> [U]nder most circumstances, profit–maximizing vertical–integration and merger decisions are efficient, not just from the firms' but also from the consumers' points of view. Although there are isolated studies that contradict this claim, the vast majority support it. Moreover, even in industries that are highly concentrated so that horizontal considerations assume substantial importance, the net effect of vertical integration appears to be positive in many instances. We therefore conclude that, faced with a vertical arrangement, the burden of evidence should be placed on competition authorities to demonstrate that that arrangement is harmful before the practice is attacked. Furthermore, we have found clear evidence that restrictions on vertical integration that are imposed, often by local authorities, on owners of retail networks are usually detrimental to consumers. Given the weight of the evidence, it behooves government agencies to reconsider the validity of such restrictions.[1]

The Supreme Court's 1948 *Paramount* decision provides concrete evidence of the problems of constraining vertical integration. That case famously ended the system of studio ownership and control of theaters, and restrained the studios' ability to bundle content. Far from serving consumer interests, however, the decision led to a marked decrease in the quantity of–and increase in the price of–movies. Most directly, between 1950 and 1955 output from the major studios fell by nearly 30 percent and both rental rates (the prices charged to theaters to show films) and admission prices rose accordingly.

It's worth noting that there have been many claims over the years about alleged program carriage problems. Dr. Singer was the main witness in the Mid-Atlantic Sports Network's claim against Time Warner Cable, and the FCC ultimately found that claim to be without merit—and the US Court of Appeals for the Fourth Circuit upheld that decision. WealthTV brought four separate program carriage complaints (against Bright House, Cox, Time Warner, and Comcast), and the FCC adjudged all of them to be without merit–and the US Court of Appeals for the Ninth Circuit upheld that decision. In all these cases, as in the *Tennis Channel* case, there were claims that vertical integration led to improper program carriage decisions, but in each case the facts

[1] Francine Lafontaine & Margaret Slade, Vertical Integration and Firm Boundaries: The Evidence, 45 J. Econ. Lit. 629 (2007) (*available at* http://www.economics.ubc.ca/files/2013/05/pdf_paper_margaret-slade-verticalintegration-firmbound.pdf.)

ultimately proved otherwise. At this point, it's fair to ask why anyone would credit these kinds of claims.

The Honorable Anna Eshoo

1. **Recent press reports indicated that ESPN was in talks with at least one major U.S. wireless carrier regarding a compensation scheme that would exempt their content from the carrier's monthly data caps. How would you respond to such a proposal?**

My main thought on this is that government ought not to be preventing experimentation with new business models in the delivery of broadband services. If I understand correctly, the idea here is that ESPN would be subsidizing the broadband provider for delivering ESPN's content to its customers. There's no inherent reason why the costs of that delivery should be paid directly by the end-user rather than a content provider, just as there is no inherent reason why the costs of using credit cards should be paid directly by end-users (as they were originally) as opposed to merchants (as is commonplace today). Something very similar to this has been happening for years with the Kindle, where the end-user pays Amazon for the e-book she buys, but it is Amazon, not the end-user, who pays the broadband provider (originally Sprint, more recently AT&T) to deliver the content. Although both the credit card and Kindle examples depart from the model that certain consumer groups advocate, I think it's fair to say these approaches have worked out well for consumers.

Text of the D.C. Circuit Court of Appeals decision in *Comcast Cable Communications, LLC v. Federal Communications Commission* (the *Tennis Channel* case), No. 12-1337, decided May 28, 2013.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 25, 2013 Decided May 28, 2013

No. 12-1337

COMCAST CABLE COMMUNICATIONS, LLC,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

THE TENNIS CHANNEL, INC.,
INTERVENOR

On Petition for Review of an Order
of the Federal Communications Commission

Miguel A. Estrada argued the cause for petitioners. With him on the briefs were *Erik R. Zimmerman* and *Lynn R. Charytan*.

H. Bartow Farr III, *Rick Chessen*, *Neal M. Goldberg*, *Michael S. Schooler*, and *Diane B. Burstein* were on the brief for *amicus curiae* The National Cable & Telecommunications Association in support of petitioner.

Peter Karanijia, Deputy General Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *Catherine G. O'Sullivan* and *Robert J. Wiggers*, Attorneys, U.S. Department of Justice, *Sean A. Lev*, General Counsel, Federal Communications Commission, *Jacob M. Lewis*, Associate General Counsel, and *Laurel R. Bergold*, Counsel. *Richard K. Welch*, Deputy Associate General Counsel, Federal Communications Commission, and *James M. Carr* and *C. Grey Pash Jr.*, Counsel, entered appearances.

Robert A. Long Jr. argued the cause for intervenor. With him on the brief were *Stephen A. Weiswasser* and *Mark W. Mosier*.

Markham C. Erickson was on the brief for *amicus curiae* Bloomberg L.P. in support of respondent.

Before: KAVANAUGH, *Circuit Judge*, and EDWARDS and WILLIAMS, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

Concurring opinion filed by *Circuit Judge* KAVANAUGH.

Concurring opinion filed by *Senior Circuit Judge* EDWARDS.

WILLIAMS, *Senior Circuit Judge*: Regulations of the Federal Communications Commission, adopted under the mandate of § 616 of the Communications Act of 1934 and

virtually duplicating its language, bar a multichannel video programming distributor ("MVPD") such as a cable company from discriminating against unaffiliated programming networks in decisions about content distribution. More specifically, the regulations bar such conduct when the effect of the discrimination is to "unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly." 47 C.F.R. § 76.1301(c); see also 47 U.S.C. § 536(a)(3). Tennis Channel, a sports programming network and intervenor in this suit, filed a complaint against petitioner Comcast Cable, an MVPD, alleging that Comcast violated § 616 and the Commission's regulations by refusing to broadcast Tennis as widely (i.e., via the same relatively low-priced "tier") as it did its own affiliated sports programming networks, Golf Channel and Versus. (Versus is now known as NBC Sports Network and was originally called Outdoor Life Network; for consistency with the order under review, we refer to it as "Versus.") An administrative law judge ruled against Comcast, ordering that it provide Tennis carriage equal to what it affords Golf and Versus, and the Commission affirmed. See *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Memorandum Opinion and Order, 27 FCC Rcd. 8508, 2012 WL 3039209 (July 24, 2012) ("Order").

Comcast's arguments on appeal are, broadly speaking, threefold. First, it contends that Tennis's complaint was untimely filed under 47 C.F.R. § 76.1302(h), given the meaning that the Commission apparently assigned that section when it last modified its language. See *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 4415, ¶ 24, 1994 WL 414309 (Aug. 5, 1994). Judge Edwards's concurring opinion addresses that issue. The panel need not do so, as the limitations period doesn't constitute a jurisdictional barrier. And as Judge Edwards notes, the Commission has launched a rulemaking apparently aimed in part at clearing up the confusion he

identifies. *In re Revision of the Commission's Program Carriage Rules*, 26 FCC Rcd. 11494, 11522-23, ¶¶ 38-39, 2011 WL 3279328 (Aug. 1, 2011).

Second, Comcast poses a number of issues as to the meaning of § 616, including an argument that the Commission reads it so broadly as to violate Comcast's free speech rights under the First Amendment. We need not reach those issues, as Comcast prevails with its third set of arguments—that even under the Commission's interpretation of § 616 (the correctness of which we assume for purposes of this decision), the Commission has failed to identify adequate evidence of unlawful discrimination.

Many arguments within this third set involve complex and at least potentially sophisticated disputes. See, e.g., Order ¶¶ 71-74 (relating to calculation of "penetration rates" for purposes of determining whether Comcast treated Tennis more or less favorably than did other MVPDs and of measuring the degree of harm caused by any such difference). But Comcast also argued that the Commission could not lawfully find discrimination because Tennis offered no evidence that its rejected proposal would have afforded Comcast *any* benefit. If this is correct, as we conclude below, the Commission has nothing to refute Comcast's contention that its rejection of Tennis's proposal was simply "a straight up financial analysis," as one of its executives put it. Joint Appendix ("J.A.") 300.

* * *

Comcast, the largest MVPD in the United States, offers cable television programming to its subscribers in several different distribution "tiers," or packages of programming services, at different prices. Since Versus's and Golf's launches in 1995, Comcast—which originally had a minority

interest in the two networks, and now has 100% ownership—has generally carried the networks on its most broadly distributed tiers, Expanded Basic or the digital counterpart Digital Starter. Order ¶ 12; J.A. 1223-24.

Tennis Channel, launched in 2003, initially sought distribution of its content on Comcast's less broadly distributed sports tier, a package of 10 to 15 sports networks that Comcast's subscribers can access for an extra $5 to $8 per month. In 2005, Tennis entered a carriage contract that gave the Comcast the "right to carry" Tennis "on any . . . tier of service," subject to exclusions irrelevant here. Comcast in fact placed Tennis on the sports tier.

In 2009, however, Tennis approached Comcast with proposals that Comcast reposition Tennis onto a tier with broader distribution. Order ¶¶ 12, 33. Tennis's proposed agreement called for Comcast to pay Tennis for distribution on a per-subscriber basis. Tennis provided a detailed analysis—which is sealed in this proceeding—of what Comcast would likely pay for that broader distribution; even with the discounts that Tennis offered, the amounts are substantial. Neither the analysis provided at the time, nor testimony received in this litigation, made (much less substantiated) projections of any resulting increase in revenue for Comcast, let alone revenue sufficient to offset the increased fees.

Comcast entertained the proposal, checking with "division and system employees to gauge local and subscriber interest." J.A. 402. After those consultations, and based on previous analyses of interest in Tennis, Comcast rejected the proposal in June 2009. Tennis then filed its complaint with the Commission in January 2010, which led to the order now under review. By way of remedy, the ALJ ordered, and the Commission affirmed, that Comcast must "carry [Tennis] on

the same distribution tier, reaching the same number of subscribers, as it does [Golf] and Versus." Order ¶ 92.

The parties agree that Comcast distributes the content of affiliates Golf and Versus more broadly than it does that of Tennis. The question is whether that difference violates § 616 and the implementing regulations. There is also no dispute that the statute prohibits only discrimination *based on* affiliation. Thus, if the MVPD treats vendors differently based on a reasonable business purpose (obviously excluding any purpose to illegitimately hobble the competition from Tennis), there is no violation. The Commission has so interpreted the statute, *Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd. 18099, ¶ 22 (2010), and the Commission's attorney conceded as much at oral argument, see Oral Arg. Tr. at 24-25; see also *TCR Sports Broad. Holding L.L.P. v. FCC*, 679 F.3d 269, 274-77 (4th Cir. 2012) (discussing the legitimate, non-discriminatory reasons for an MVPD's differential treatment of a non-affiliated network).

In contrast with the detailed, concrete explanation of Comcast's additional costs under the proposed tier change, Tennis showed no corresponding benefits that would accrue to Comcast by its accepting the change. Testimony from one of Comcast's executives identifies some of the factors it considers when deciding whether to move a channel to broader distribution:

> In deciding whether to carry a network and at what cost, Comcast Cable must balance the costs and benefits associated with a wide range of factors, including: the amount of the licensing fees (which is generally the most important factor); the nature of the programming content involved; the intensity and size of the fan base for that content; the level of service sought by the

> network; the network's carriage on other MVPDs; the extent of [most favored nation][1] protection provided; the term of the contract sought; and a variety of other operational issues.

J.A. 408, ¶ 32. Of course the record is very strong on the proposed increment in licensing fees, in itself a clear negative. The question is whether the other factors, and perhaps ones unmentioned by Comcast, establish reason to expect a net benefit.

But neither Tennis nor the Commission offers such an analysis on either a qualitative or a quantitative basis. Instead, the best the Commission offers, both in the Order and at oral argument, is that Tennis charges less per "rating point" than does either Golf or Versus. Order ¶ 78 n.243; Oral Arg. Tr. at 25-29. But those differentials are not affirmative evidence that acceptance of Tennis's 2009 proposal could have offered Comcast any net gain. Even if we were to assume arguendo that low charges per ratings point are the be-all and the end-all of assigning a network to a broadly accessible tier (and the record does not support such an assumption), the cost-per-ratings-point evidence would at most show that (by this particular criterion) Tennis's gross cost is not as high as that of either Golf or Versus. It does not show any affirmative net benefit. As to the assumption about cost per ratings point, the sealed record suggests (consistent with Comcast's evidence about the factors guiding its tier placement decisions) that a very high price per rating point is by no means an absolute barrier to placement in a broadly available tier. J.A. 51, 1112.

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[1] A "most favored nation" provision grants the distributor "the right to be offered any more favorable rates, terms, or conditions subsequently offered or granted by a network to another distributor." J.A. 1376.

In the absence of evidence that the lower cost per ratings point is correlated with changes in revenues to offset the proposed cost increase for Tennis's broader distribution, the discussion of cost per ratings point is mere handwaving.

A rather obvious type of proof would have been expert evidence to the effect that X number of subscribers would switch to Comcast if it carried Tennis more broadly, or that Y number would leave Comcast in the absence of broader carriage, or a combination of the two, such that Comcast would recoup the proposed increment in cost. There is no such evidence. (Conceivably Tennis could have shown that the incremental losses from carrying Tennis in a broad tier would be the same as or less than the incremental losses Comcast was incurring from carrying Golf and Versus in such tiers. The parties do not even hint at this possibility, nor analyze its implications.)

Not only does the record lack affirmative evidence along these lines, there is evidence that no such benefits exist. After Tennis proposed the broader distribution of its content on Comcast's network, Comcast executives surveyed employees in various geographic divisions to gauge interest in the proposal. The executive in charge of the northern division reported that there was "[n]o interest whatsoever" in moving Tennis to a broader distribution, J.A. 349, because there had never been "a request or a complaint to move Tennis Channel to a more available tier," *id.* at 350. Perhaps more telling is the natural experiment conducted in Comcast's southern division. There Comcast had in 2007 or 2008 acquired a distribution network from another MVPD that had distributed Tennis more broadly than did Comcast. When Comcast repositioned Tennis to the sports tier (a "negative repo" in MVPD lingo), thereby making it available to Comcast's general subscribers only for an additional fee, not one customer complained about the change.

When we asked at oral argument about the absence of evidence of benefit to Comcast from the proposed tier change, Commission counsel pointed not to any such evidence but to the ALJ's remedy (affirmed by the Commission), which gave Comcast the alternative of narrowing the exposure of Golf and Versus (rather than broadening that of Tennis). Such a change was the Commission's alternative remedy for bringing the three networks to tiering parity. But the discriminatory act alleged by the Commission was Comcast's refusal to broaden its distribution of Tennis, not a refusal to narrow its distribution of Golf and Versus. The latter may make complete sense in terms of providing an evenhanded remedy. But evidence that such a change would have afforded Comcast a net benefit—for example, by generating incremental sports tier fees exceeding incremental losses from the removal of Golf and Versus from lower priced tiers—would in itself have little bearing on the lawfulness of Comcast's rejection of Tennis's actual proposal to extend distribution of the latter's content. It is thus unsurprising that no one organized data to test the profitability of this hypothetical tiering change.

This is not to say that the record lacks evidence of important *similarities* between Tennis on the one hand and Golf and Versus on the other. See, e.g., Order ¶¶ 51-55. If accompanied by evidence that (assuming Golf and Versus had been on the sports tier at the time of Tennis's proposal in 2009) a shift of them to broader coverage would have yielded incremental revenue equivalent to what Tennis demanded in 2009, the comparative data might have done the job. But no such evidence was offered.

Neither Tennis nor the Commission has invoked the concept that an otherwise valid business consideration is here merely pretextual cover for some deeper discriminatory purpose. Instead, both Tennis and the Commission challenge

Comcast's cost-benefit analysis as insufficiently rigorous. While Tennis and the Commission both label that analysis "pretextual," see Tennis Br. at 18; Resp'ts' Br. at 31, their actual claim is that the cost-benefit analysis was too hastily performed to justify Comcast's rejection of Tennis's proposal, thus supporting an inference that discrimination was the true motive. In light of the evidence surveyed above, and the lack of evidence from which one might infer any net benefit, Comcast's haste is irrelevant.

We note that the FCC's Media Bureau found that Tennis had established a *prima facie* case and that the Commission assumed without deciding that in those circumstances Tennis retained the burden of proof throughout the proceeding. Order ¶ 38. We will assume arguendo, in favor of the Commission, that the Media Bureau was correct in its finding of a *prima facie* case and that in those circumstances it could shift the burden to the respondent. But that assumption is of no use to the Commission where the record simply lacks material evidence that the Tennis proposal offered Comcast any commercial benefit.

Without showing any benefit for Comcast from incurring the additional fees for assigning Tennis a more advantageous tier, the Commission has not provided evidence that Comcast discriminated against Tennis on the basis of affiliation. And while the Commission describes at length the "substantial evidence" that supports a finding that the discrimination is based on affiliation, Resp'ts' Br. at 25-31, none of that evidence establishes benefits that Comcast would receive if it distributed Tennis more broadly. On this issue the Commission has pointed to no evidence, and therefore obviously not to substantial evidence. See *Guardian Moving & Storage Co., Inc. v. ICC*, 952 F.2d 1428, 1433 (D.C. Cir. 1992).

11

* * *

The petition is therefore

Granted.

KAVANAUGH, *Circuit Judge*, concurring: Video programming distributors such as Comcast deliver video programming networks to consumers. Under Section 616 of the Communications Act, a video programming distributor may not discriminate against an unaffiliated programming network in a way that "unreasonably restrain[s]" the unaffiliated network's ability to compete fairly. Applying that statute in this case, the FCC found that Comcast discriminated against the unaffiliated Tennis Channel network by refusing to carry that network on the same cable tier that Comcast carries its affiliated Golf Channel and Versus networks. The FCC also found that the discrimination unreasonably restrained the Tennis Channel's ability to compete fairly. As a remedy, the FCC ordered Comcast to carry the Tennis Channel on the same tier that it carries the Golf Channel and Versus.

As the Court's opinion explains, the FCC erred in concluding that Comcast discriminated against the Tennis Channel on the basis of affiliation. I join the Court's opinion in full. I write separately to point out that the FCC also erred in a more fundamental way. Section 616's use of the phrase "unreasonably restrain" – an antitrust term of art – establishes that the statute applies only to discrimination that amounts to an unreasonable restraint under antitrust law. Vertical integration and vertical contracts – for example, between a video programming distributor and a video programming network – become potentially problematic under antitrust law only when a company has market power in the relevant market. It follows that Section 616 applies only when a video programming distributor possesses market power. But Comcast does not have market power in the national video programming distribution market, the relevant market analyzed by the FCC in this case. Therefore, as I will explain in Part I of this opinion, Section 616 does not apply here.

Applying Section 616 to a video programming distributor that lacks market power not only contravenes the terms of the statute, but also violates the First Amendment as it has been interpreted by the Supreme Court. As I will explain in Part II of this opinion, the canon of constitutional avoidance thus strongly reinforces the conclusion that Section 616 applies only when a video programming distributor possesses market power.

I

Section 616 of the Communications Act requires the FCC to:

> prevent a multichannel video programming distributor from engaging in conduct the effect of which is to *unreasonably restrain* the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

47 U.S.C. § 536(a)(3) (emphasis added); *see* 47 C.F.R. § 76.1301(c). The statutory text establishes that a Section 616 violation has two elements. First, the video programming distributor must have discriminated against an unaffiliated video programming network on the basis of affiliation. Second, the video programming distributor's discrimination must have "unreasonably restrain[ed]" the unaffiliated network's ability "to compete fairly."

Congress enacted Section 616 (over the veto of President George H.W. Bush) as part of the Cable Television Consumer Protection and Competition Act of 1992, known as the Cable

Act. The Cable Act included numerous provisions designed to curb abuses of cable operators' bottleneck monopoly power and to promote competition in the cable television industry. When the Act was passed, however, the video programming market looked quite different than it looks today. At the time, most households subscribed to cable in order to view television programming. And as Congress noted, "most cable television subscribers [had] no opportunity to select between competing cable systems." Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460, 1460 (1992). Congress decided to proactively counteract the bottleneck monopoly power that cable operators possessed in many local markets.

The Cable Act employs a variety of tools to advance competition. Some provisions directly prohibit practices that Congress viewed as anticompetitive in the market at the time. For example, the Act prohibits local franchising authorities from granting exclusive franchises to cable operators. *See id.* § 7(a), 106 Stat. at 1483. Similarly, the Act's "must-carry" provisions require cable operators to carry a specified number of local broadcast stations. *See id.* § 4, 106 Stat. at 1471.

In other parts of the Act, Congress borrowed from antitrust law, authorizing the FCC to regulate cable operators' conduct in accordance with antitrust principles. For example, the Act requires the FCC, when prescribing limits on the number of cable subscribers or affiliated channels, to take account of "the nature and market power of the local franchise." *See id.* § 11(c), 106 Stat. at 1488. Similarly, the Act allows rate regulation only of those cable systems that are not subject to effective competition. *See id.* § 3, 106 Stat. at 1464.

The provision at issue in this case, Section 616, incorporates traditional antitrust principles. Section 616 does not categorically forbid a video programming distributor from extending preferential treatment to affiliated video programming networks or lesser treatment to unaffiliated video programming networks. Rather, to violate Section 616, a video programming distributor must discriminate among video programming networks on the basis of affiliation, *and* the discrimination must "unreasonably restrain" an unaffiliated network's ability to compete fairly. 47 U.S.C. § 536(a)(3).

The phrase "unreasonably restrain" is of course a longstanding term of art in antitrust law. *See, e.g., Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) ("[T]he Court has repeated time and again that § 1 outlaws only unreasonable restraints.") (internal quotation marks and alteration omitted); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) ("Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' this Court has long recognized that Congress intended to outlaw only unreasonable restraints."); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988) ("Since the earliest decisions of this Court interpreting [Section 1 of the Sherman Act], we have recognized that it was intended to prohibit only unreasonable restraints of trade.").

When a statute uses a term of art from a specific field of law, we presume that Congress adopted "the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012) (internal quotation mark omitted); *see also Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598,

615 (2001) (Scalia, J., concurring) ("Words that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning."); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) ("In the absence of contrary indication, we assume that when a statute uses such a term [of art], Congress intended it to have its established meaning."); *Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[A]bsence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 73 (2012) (where "a word is obviously transplanted from another legal source, . . . it brings the old soil with it") (internal quotation mark omitted); *cf. FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1015 (2013) (reading statute "in light of our national policy favoring competition").

From the "term of art" canon and Section 616's use of the antitrust term of art "unreasonably restrain," it follows that Section 616 incorporates antitrust principles governing unreasonable restraints.

So what does antitrust law tell us? In antitrust law, certain activities are considered per se anticompetitive. Otherwise, however, conduct generally can be considered unreasonable only if a firm, or multiple firms acting in concert, have market power. *See Leegin Creative Leather Products*, 551 U.S. at 885-86; *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984); *see also Standard Oil Co. v. United States*, 283 U.S. 163, 179 (1931).

This case involves vertical integration and vertical contracts. Beginning in the 1970s (well before the 1992 Cable Act), the Supreme Court has recognized the legitimacy

of vertical integration and vertical contracts by firms without market power. *See, e.g.*, *Leegin Creative Leather Products*, 551 U.S. 877; *State Oil Co.*, 522 U.S. 3; *Business Electronics*, 485 U.S. 717; *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). Vertical integration and vertical contracts become potentially problematic only when a firm has market power in the relevant market. That's because, absent marketpower, vertical integration and vertical contracts are *procompetitive*. Vertical integration and vertical contracts in a competitive market encourage product innovation, lower costs for businesses, and create efficiencies – and thus reduce prices and lead to better goods and services for consumers. *See* Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 76 (1991) ("Antitrust law is a bar to the use of vertical restraints only in markets in which there is no apparent interbrand competition to protect consumers from a potentially welfare-decreasing restraint on intrabrand competition."); Dennis L. Weisman & Robert B. Kulick, *Price Discrimination, Two-Sided Markets, and Net Neutrality Regulation*, 13 TUL. J. TECH. & INTELL. PROP. 81, 99 (2010) ("[M]onopoly power in one market is a necessary condition for anticompetitive effects in almost all models of anticompetitive vertical integration."); *see also* 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 756a, at 9 (3d ed. 2008) (vertical integration "is either competitively neutral or affirmatively desirable because it promotes efficiency"); ROBERT H. BORK, THE ANTITRUST PARADOX 226 (1978) ("vertical integration is indispensable to the realization of productive efficiencies").

Not surprisingly given its procompetitive characteristics, vertical integration and vertical contracts are common and accepted practices in the American economy: Apple's

iPhones contain integrated hardware and software, Dunkin' Donuts sells Dunkin' Donuts coffee, Ford produces radiators for its cars, McDonalds sells Big Macs, Nike stores are stocked with Nike shoes, Netflix owns "House of Cards," and so on. As Professors Areeda and Hovenkamp have explained, vertical integration "is ubiquitous in our economy and virtually never poses a threat to competition when undertaken unilaterally and in competitive markets." 3B AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 755c, at 6.

Following the lead of the Supreme Court and influential academic literature on which the Supreme Court has relied in the antitrust field, this Court's case law has stated that vertical integration and vertical contracts are procompetitive, at least absent market power. *See Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 721 (D.C. Cir. 2011) (vertical integration is "not always pernicious and, depending on market conditions, may actually be procompetitive"); *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 840 (D.C. Cir. 2006) ("We began by emphasizing that vertical integration creates efficiencies for consumers."); *Tenneco Gas v. FERC*, 969 F.2d 1187, 1201 (D.C. Cir. 1992) ("[A]dvantages a pipeline gives its affiliate are improper only to the extent that they flow from the pipeline's anti-competitive market power. Otherwise vertical integration produces permissible efficiencies that cannot by themselves be considered uses of monopoly power.") (internal quotation marks omitted); *see also Cablevision Systems Corp. v. FCC*, 597 F.3d 1306, 1325 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) ("At least unless a company possesses market power in the relevant market, vertical integration and exclusive vertical contracts are not anti-competitive; on the contrary, such arrangements are 'presumptively procompetitive.'") (quoting 11 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1803, at 100 (2d ed. 2005)).

Now back to Section 616: Because Section 616 incorporates antitrust principles and because antitrust law holds that vertical integration and vertical contracts are potentially problematic only when a firm has market power in the relevant market, it follows that Section 616 applies only when a video programming distributor has market power in the relevant market.[1] Section 616 thus does not bar vertical integration or vertical contracts that favor affiliated video programming networks, absent a showing that the video programming distributor at least has market power in the relevant market. To conclude otherwise would require us to depart from the established meaning of the term of art "unreasonably restrain" that Section 616 uses. Moreover, to conclude otherwise would require us to believe that Congress intended to *thwart* procompetitive practices. It would of course make little sense to attribute that motivation to Congress.

How, then, did the FCC reach the opposite conclusion in this case? The short answer is that the FCC badly misread the statute. Contrary to the plain language of Section 616, the FCC stated that the term "unreasonably" modified "discriminating" not "restrain" – even though Section 616

[1] Section 616 and the Cable Act provisions that incorporate antitrust principles are not merely redundant of antitrust law. To be sure, the Federal Trade Commission and the U.S. Department of Justice Antitrust Division enforce federal antitrust laws, and private citizens may bring civil antitrust suits as well. But in the Cable Act, Congress authorized a separate enforcement agency, the FCC, to regulate certain practices of cable operators. For that reason, even Cable Act provisions such as Section 616 that mirror existing antitrust proscriptions serve an important regulatory purpose, akin to adding new police officers to enforce an existing law.

says it applies only to discriminatory conduct that "unreasonably restrain[s]" the ability of a competitor to compete fairly. *See* Order ¶¶ 43, 85-86. Because the FCC did not read Section 616 as written, it did not recognize the antitrust term of art "unreasonably restrain" that is apparent on the face of the statute. That erroneous reading of the text, in turn, led the FCC to mistakenly focus on the effects of Comcast's conduct on a competitor (the Tennis Channel) rather than on overall competition. *See id.* ¶¶ 83-85.[2] That was a mistake because the goal of antitrust law (and thus of Section 616) is to promote consumer welfare by protecting competition, not by protecting individual competitors. *See, e.g.*, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (Sherman Act plaintiff "must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself"); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("The antitrust laws . . . were enacted for the protection of *competition*, not *competitors*.") (internal quotation marks omitted); *see also* AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 755c, at 6 ("[E]ven competitively harmless vertical integration can injure rivals or vertically related firms, but such injuries are not the concern of the antitrust laws.").

It is true that Section 616 references discrimination against competitors. But again, the statute does not ban such

[2] Because the FCC's Order never actually interpreted the phrase "unreasonably restrain," we would have to remand even if we thought Section 616 reasonably could be applied to video programming distributors without market power. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

discrimination outright. It bans discrimination that *unreasonably restrains* a competitor from competing fairly. By using the phrase "unreasonably restrain," the statute incorporates an antitrust term of art, and that term of art requires that the discrimination in question hinder overall competition, not just competitors.

In sum, Section 616 targets instances of preferential program carriage that are anticompetitive under the antitrust laws. Section 616 thus may apply only when a video programming distributor possesses market power in the relevant market. Comcast has only about a 24% market share in the national video programming distribution market; it does not possess market power in the market considered by the FCC in this case. *See* Order ¶ 87.[3] Therefore, the FCC erred in finding that Comcast violated Section 616.

II

To the extent there is uncertainty about whether the phrase "unreasonably restrain" in Section 616 means that the statute applies only in cases of market power or instead may have a broader reach, we must construe the statute to avoid "serious constitutional concerns." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 577 (1988); *see also Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 172 (2001).[4] That canon strongly

[3] In some local geographic markets around the country, a video programming distributor may have market power. This case does not call upon us to consider how Section 616 would apply to discrimination against unaffiliated networks in such local markets.

[4] There is some debate about how serious the statute's constitutional questions must be, and indeed whether the statute

supports limiting Section 616 to cases of market power. Applying Section 616 to a video programming distributor that lacks market power would raise serious First Amendment questions under the Supreme Court's case law. Indeed, applying Section 616 to a video programming distributor that lacks market power would violate the First Amendment as it has been interpreted by the Supreme Court.

To begin with, the Supreme Court has squarely held that a video programming distributor such as Comcast both engages in and transmits speech, and is therefore protected by the First Amendment. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994). Just as a newspaper exercises editorial discretion over which articles to run, a video programming distributor exercises editorial discretion over which video programming networks to carry and at what level of carriage.

It is true that, under the Supreme Court's precedents, Section 616's impact on a cable operator's editorial control is content-neutral and thus triggers only intermediate scrutiny rather than strict scrutiny. *See id.* at 642-43. But the Supreme Court's case law applying intermediate scrutiny in this context provides that the Government may interfere with a video programming distributor's editorial discretion only when the video programming distributor possesses market power in the relevant market.

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otherwise must be unconstitutional, for the avoidance doctrine to apply. *See generally* Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) (criticizing the avoidance doctrine as a "judge-made constitutional 'penumbra'"). That debate is irrelevant to my analysis here because I have concluded that it would indeed be unconstitutional to apply Section 616 absent market power.

In its 1994 decision in *Turner Broadcasting*, the Supreme Court ruled that the Cable Act's must-carry provisions might satisfy intermediate First Amendment scrutiny, but the Court rested that conclusion on "special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Id.* at 661. When a cable operator has bottleneck power, the Court explained, it can "silence the voice of competing speakers with a mere flick of the switch." *Id.* at 656. In subsequently upholding the must-carry provisions, the Court reiterated that cable's bottleneck monopoly power was critical to the First Amendment calculus. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 197-207 (1997) (controlling opinion of Kennedy, J.).[5] The Court stated that "cable operators possess[ed] a local monopoly over cable households," with only one percent of communities being served by more than one cable operator. *Id.* at 197.

In 1996, when this Court upheld the Cable Act's exclusive-contract provisions against a First Amendment challenge, we likewise pointed to the "special characteristics" of the cable industry. *See Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996). Essential to our decision were "both the bottleneck monopoly power exercised by cable operators and the unique power that vertically integrated

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[5] In the 1997 *Turner Broadcasting* case, Justice Kennedy's opinion represented the "position taken by those Members who concurred in the judgment[] on the narrowest grounds." *See Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation mark omitted). That opinion's evaluation of anticompetitive behavior and the significance of bottleneck power analytically lay between that of Justice Breyer's concurring opinion on the one hand and the dissent on the other.

companies have in the cable market." *Id.* at 978 (internal quotation marks and citation omitted).

But in the 16 years since the last of those cases was decided, the video programming distribution market has changed dramatically, especially with the rapid growth of satellite and Internet providers. This Court has previously described the massive transformation, explaining that cable operators "no longer have the bottleneck power over programming that concerned the Congress in 1992." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009); *see also Cablevision Systems Corp. v. FCC*, 597 F.3d 1306, 1324 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) ("This radically changed and highly competitive marketplace – where no cable operator exercises market power in the downstream or upstream markets and no national video programming network is so powerful as to dominate the programming market – completely eviscerates the justification we relied on in *Time Warner* for the ban on exclusive contracts."); Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 229 (2002) ("It thus appears that the national market for MVPDs is already too unconcentrated to support the conclusion that vertical integration could have any anti-competitive effects.").

In today's highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market. To be sure, beyond an interest in policing anticompetitive behavior, the FCC may think it preferable simply as a communications policy matter to equalize or enhance the voices of various entertainment and sports networks such as the Tennis Channel. But as the Supreme Court stated in one of the most important sentences in First

Amendment history, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

Therefore, under these circumstances, the FCC cannot tell Comcast how to exercise its editorial discretion about what networks to carry any more than the Government can tell Amazon or Politics and Prose or Barnes & Noble what books to sell; or tell the *Wall Street Journal* or *Politico* or the *Drudge Report* what columns to carry; or tell the MLB Network or ESPN or CBS what games to show; or tell *SCOTUSblog* or *How Appealing* or *The Volokh Conspiracy* what legal briefs to feature.

In light of the Supreme Court's precedents interpreting the First Amendment and the massive changes to the video programming distribution market over the last two decades, the FCC's interference with Comcast's editorial discretion cannot stand. In restricting the editorial discretion of video programming distributors, the FCC cannot continue to implement a regulatory model premised on a 1990s snapshot of the cable market.

The Supreme Court's precedents amply demonstrate that the FCC's interpretation of Section 616 violates the First Amendment. At a minimum, the Supreme Court's precedents raise serious First Amendment questions about the FCC's interpretation of Section 616. Under the constitutional avoidance canon, those serious constitutional questions require that we construe Section 616 to apply only when a video programming distributor possesses market power.

* * *

The FCC erred in concluding that Section 616 may apply to a video programming distributor without market power. For that reason, in addition to the reasons given by the Court, the FCC's Order cannot stand.

EDWARDS, *Senior Circuit Judge*, concurring: I concur in Judge Williams' cogent opinion for the court. It is clear from the record that, even accepting the FCC's interpretation of Section 616, there is no substantial evidence of unlawful discrimination to support the Commission's decision in this case. I write separately because I believe that Tennis Channel's complaint was untimely filed under the applicable statute of limitations encoded in 47 C.F.R. § 76.1302(f) (2010). I would rest on this ground alone if the statute of limitations requirements were jurisdictional, but they are not. Nonetheless, the issues raised by the statute of limitations issue are, in my view, very important because they highlight the agency's failure to give fair notice to regulated parties of the rules governing the filing of complaints under Section 616. And, as explained below, the FCC's current interpretation of subsection 76.1302(f)(3)is not only incomprehensible but it fails to credit the sanctity of the parties' contractual commitments. Hopefully, these matters will be addressed in the FCC's pending rulemaking. *See In re Revision of the Commission's Program Carriage Rules*, Notice of Proposed Rulemaking, 26 FCC Rcd. 11494, 11522-23, ¶¶ 38-39, 2011 WL 3279328 (Aug. 1, 2011).

As explained in the opinion for the court, this case involves a complaint filed in 2010 by Tennis Channel, a sports programming network, with the Federal Communications Commission ("FCC" or "Commission") against Comcast Cable Communications, LLC ("Comcast"), a multichannel video programming distributor ("MVPD"). The complaint alleged that Comcast had discriminated against Tennis Channel, in violation of Section 616 of the Communications Act of 1934, 47 U.S.C. § 536(a)(3), when it declined to distribute Tennis Channel as broadly as Golf Channel and Versus, sports networks owned by Comcast.

After launching in 2003, Tennis Channel sought carriage on Comcast's "Sports Tier," a package of sports networks that are accessible to Comcast subscribers for an added fee. Tennis Channel and Comcast executed a carriage contract in 2005 pursuant to which Comcast retained unfettered authority to distribute Tennis Channel on any tier. Comcast elected to carry Tennis Channel on its Sports Tier. At the time when Tennis Channel entered into its contract with Comcast, Golf Channel and Versus were affiliated with Comcast and both networks were carried on more broadly distributed tiers. In 2006 and 2007, Tennis Channel offered Comcast and other MVPDs equity in exchange for broader carriage. Comcast and several other MVPDs declined. In 2009, Tennis Channel again asked Comcast to move it to a tier with broader distribution than the Sports Tier. The two parties discussed the possibility. After unproductive discussions, Tennis Channel broke off negotiations. In the end, Comcast (and other MVPDs as well) rejected Tennis Channel's requests for broader carriage. In 2010, all major MVPDs – including Tennis Channel's partial owners, DirecTV and Dish Network – distributed Tennis Channel less broadly than Golf Channel and Versus.

After Comcast elected to stand on its contract rights and declined to distribute Tennis Channel more broadly, Tennis Channel filed a carriage complaint against Comcast under Section 616. The complaint alleged that Comcast discriminated against Tennis Channel on the basis of affiliation by distributing it more narrowly than Golf Channel and Versus. The Commission's Media Bureau rejected Comcast's statute-of-limitations defense on the pleadings and set the matter for a hearing before an Administrative Law Judge ("ALJ"). The ALJ issued an Initial Decision finding that Comcast had violated Section 616. In a 3-2 split decision, the FCC upheld the Media Bureau's denial of Comcast's statute of limitations defense and affirmed the ALJ's

judgment on the merits against Comcast. *See Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC* ("*Order*"), Memorandum Opinion and Order, 27 FCC Rcd. 8508, 2012 WL 3039209 (July 24, 2012).

In its petition for review, Comcast raises three principal claims. First, Comcast contends that Tennis Channel's complaint should have been dismissed as untimely. Second, Comcast argues that the Commission's Order misconstrues and misapplies Section 616. Finally, Comcast contends that the FCC's Order violates the First Amendment because it impermissibly regulates Comcast's speech based on its content. I will focus solely on the first contention, i.e., that Tennis Channel's complaint was filed out of time.

FCC regulations state that "[a]ny complaint . . . must be filed within one year of the date on which . . . (1) The multichannel video programming distributor enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section." 47 C.F.R. § 76.1302(f)(1) (2010). Tennis Channel entered into its contract with Comcast in 2005; however, it did not file a complaint until 2010 – long after the one-year limitations period had expired. As Comcast notes, "[t]he parties' contract allows Comcast to carry Tennis Channel on any tier that Comcast chooses. By seeking an order that compels Comcast to carry it more broadly, Tennis Channel is attempting to rewrite the terms of the contract. Permitting Tennis Channel to reopen the limitations period for that contract-based claim at any time – simply by making a pretextual demand for broader carriage – would . . . directly contradict the entire purpose of the statute of limitations." Br. for Pet'r at 58-59. I agree.

The FCC's Order says that the applicable limitations period is governed by 47 C.F.R. § 76.1302(f)(3), which states that "[a]ny complaint . . . must be filed within one year of the

date on which . . . (3) A party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section." According to the FCC, Tennis Channel's complaint was timely under (f)(3) because Tennis Channel filed it "within one year of notifying Comcast of its intent to do so." *Order*, 27 FCC Rcd. at 8520 ¶ 30. I can find no merit in this position. As Comcast properly observes, the FCC's "approach not only rewrites the statute of limitations, but also *nullifies* it by allowing a party to a carriage contract to bring suit at any time." Br. for Pet'r at 58.

Tennis Channel's complaint seeks to modify the terms of the parties' contract by demanding that Comcast move it to a tier with broader distribution. Tennis Channel has no right under the contract to pursue this demand and Comcast has no obligation to accede to it. Tennis Channel's complaint thus raises a claim that the contract provisions giving Comcast unfettered authority to determine whether to carry Tennis Channel on its Sports Tier or some other tier violate Section 616. Therefore, under subsection (f)(1), Tennis Channel had one year from the date of contract formation to file its complaint. Because Tennis Channel's 2010 complaint was filed well beyond a year after contract formation, the complaint was time-barred. The FCC's purported application of subsection (f)(3), in lieu of subsection (f)(1), flies in the face of the Commission's longstanding interpretation of 47 C.F.R. § 76.1302(f). The FCC has repeatedly explained that subsection (f)(3) applies only in cases where an MVPD denies or refuses to acknowledge a request to negotiate for carriage, which is not what happened in this case. The FCC was not free to simply abandon its longstanding construction of subsection (f)(3) without notice-and-comment rulemaking. *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1033-36 (D.C. Cir. 1999); *see also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (holding that

agencies must provide "fair warning of the conduct a regulation prohibits or requires").

I. Background

A. The Statutory and Regulatory Framework

The Cable Television Consumer Protection and Competition Act of 1992, PUB. L. NO. 102-385, § 12, 106 Stat. 1460, 1488 (1992), added Section 616 to the Communications Act of 1934. Section 616 requires the FCC to issue regulations "to prevent [an MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage." 47 U.S.C. § 536(a)(3). The Commission's regulations define "affiliated" as an MVPD "ha[ving] an attributable interest" in the network. 47 C.F.R. § 76.1300(a)-(b). As noted above, the regulations also establish a statute of limitations for Section 616 complaints. The applicable regulations state:

> (f) *Time limit on filing of complaints.* Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:
>
> (1) The multichannel video programming distributor enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section; or
>
> (2) The multichannel video programming distributor offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is

unrelated to any existing contract between the complainant and the multichannel video programming distributor; or

(3) A party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section.

47 C.F.R. § 76.1302(f). The FCC recodified subsection 76.1302(f) as subsection 76.1302(h) in 2012 without any substantive change. For the sake of consistency with the parties' briefing and the FCC's Order, I will refer to subsection 76.1302(f).

B. Facts and Procedural History

Comcast is the largest MVPD in the United States. It offers cable television programming to its subscribers in several different distribution "tiers" – i.e., packages of programming services – at different prices. Core programming is contained in Comcast's "Expanded Basic Tier," or its digital counterpart, the "Digital Starter Tier," which are its mostly widely distributed tiers. The more expensive "Digital Preferred Tier" provides customers with access to additional networks and is Comcast's second most widely-distributed tier. Comcast's Sports and Entertainment Package ("Sports Tier") consists of a package of sports-related networks and is available to Comcast subscribers for an additional fee. The Sports Tier is not as widely distributed as the Expanded Basic, Digital Starter, and Digital Preferred tiers.

Golf Channel and Versus are cable sports networks that were launched in 1995. Versus was known as the Outdoor Life Network when it launched and is now known as NBC Sports Network. (For the sake of consistency with the parties'

briefing and the FCC's Order, I will refer to the network as Versus.) Golf Channel provides coverage of golf tournaments and other golf-related programming. Versus provides coverage of numerous sports, including hockey, college football and basketball, lacrosse, hunting, and fishing. Both networks paid substantial sums beginning in 1995 to induce MVPDs, including Comcast, to distribute them broadly. Both networks are generally carried on Comcast's Digital Starter or Expanded Basic tiers. Comcast owned a minority interest in Golf Channel and Versus when they launched in 1995 and subsequently became the controlling owner of both networks.

Tennis Channel, a network that provides tennis-related programming, launched in 2003. The evidence in the record indicates that, by that time, "it was more difficult for new networks to obtain broad distribution than in 1995 because the associated costs for cable operators had increased and because competition from satellite and telephone providers had reduced cable operators' ability to absorb those costs." Br. for Pet'r at 7 (citing Joint Appendix 422-25, 519-22). In 2005, Tennis Channel and Comcast entered into a carriage contract reserving to Comcast the right to choose on which tier to carry the network. Comcast chose to carry, and still carries, Tennis Channel on its Sports Tier. Tennis Channel negotiated agreements with other MVPDs that granted similar rights with respect to the network's level of carriage.

In 2006 and 2007, Tennis Channel offered Comcast and other MVPDs equity in exchange for broader carriage. Two satellite companies – DirecTV and Dish Network – accepted that offer, became partial owners of Tennis Channel, and increased their distribution of the network. But Comcast and at least one other MVPD declined the offer. In 2009, Tennis Channel presented Comcast with two proposals for broader distribution on Comcast's Digital Starter or Digital Preferred tiers. Comcast argues that it saw no economic benefit in

Tennis Channel's proposals, and Tennis Channel broke off negotiations in June 2009. Tennis Channel's tier placement position vis-à-vis Golf Channel and Versus was the same in 2010 as it had been in 2005 when Comcast and Tennis Channel executed their carriage contract. Indeed, as noted above, in 2010, all major MVPDs – including DirecTV and Dish Network – distributed Golf Channel and Versus more broadly than Tennis Channel.

In December 2009, Tennis Channel notified Comcast of its intent to file a Section 616 complaint. In January 2010, Tennis Channel filed its complaint asserting that it was

> necessitated by Comcast's discriminatory refusal to provide Tennis Channel with the broader carriage that it provides to the similarly situated sports networks it owns (such as the Golf Channel and Versus) and that is otherwise appropriate in light of Tennis Channel's quality and performance.

Compl. at i. The FCC's Media Bureau rejected Comcast's argument that the complaint was time-barred and referred to the matter to an ALJ. *The Tennis Channel, Inc. v. Comcast Cable Commc'ns LLC*, Hearing Designation Order, 25 FCC Rcd. 14149, 2010 WL 3907080 (Oct. 5, 2010). After a six-day hearing, the ALJ found that Comcast had violated Section 616 and ordered Comcast to carry Tennis Channel "at the same level of distribution" as Golf Channel and Versus. *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Initial Decision, 26 FCC Rcd. 17160, 2011 WL 6416431 (Dec. 20, 2011). Comcast appealed to the full Commission, which ruled 3-2 to reject Comcast's statute-of-limitations defense and uphold most of the ALJ's decision. *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, ("*Order*"), Memorandum Opinion and Order, 27 FCC Rcd. 8508, 2012 WL 3039209 (July 24, 2012). After Comcast filed a petition

for review with this court, we granted its motion to stay the Order pending our final decision in this case.

II. Analysis

The parties agree that Tennis Channel's complaint must be dismissed if it was untimely. Comcast contends that the complaint should have been dismissed pursuant to 47 C.F.R. § 76.1302(f)(1). The FCC, however, concluded that the applicable statute of limitations was governed by 47 C.F.R. § 76.1302(f)(3). *Order*, 27 FCC Rcd. at 8519-22 ¶¶ 28-34. The agency found that Tennis Channel's complaint was timely because it was filed in January 2010, one month after Tennis Channel notified Comcast of its intent to file and seven months after Comcast declined Tennis Channel's demand to relocate to a different distribution tier. *Id.* at 8519-20 ¶ 30 & n.105.

Comcast is right that the FCC's application of the statute of limitations in this case cannot be reconciled with the agency's original and consistent view that subsection (f)(3) only applies where a "defendant unreasonably refuses to negotiate [for carriage] with [a] complainant." *1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules* ("*1999 Order on Reconsideration*"), Order on Reconsideration, 14 FCC Rcd. 16433, 16435 ¶ 5, 1999 WL 766253 (Sept. 29, 1999). The FCC concedes that Tennis Channel's complaint is time-barred under this interpretation of the rule. *See* Br. for Resp'ts at 64 ("[T]he rule as originally promulgated was limited to denials or to refusals to negotiate for carriage . . . ."). The Commission has never properly amended the statute of limitations regulations to embrace the interpretation that it now advances. It is therefore clear that Tennis Channel filed its complaint out of time.

A. Standard of Review

The governing law makes it plain that this court owes no deference to the Commission's current interpretation of 47 C.F.R. § 76.1302(f)(3). A court "must defer to [an agency's] interpretation [of a regulation] unless an alternative reading is compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). An agency's interpretation of its own regulation is entitled to no deference if it has, "under the guise of interpreting a regulation, [created] *de facto* a new regulation," *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000), or subjected a party to "unfair surprise," *Christopher*, 132 S. Ct. at 2166-70. *See also Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000) (holding that deference is inappropriate when the agency "flip-flops," offering a litigation position that differs from interpretations previously adopted by the agency, or when the agency offers contradictory interpretations on appeal). If an agency's present interpretation of a regulation would essentially amend the contested regulation, then the modification can only be made in accordance with the notice and comment requirements of the APA. *Alaska Prof'l Hunters*, 177 F.3d at 1033-36.

B. The Applicable Statute of Limitations

1. *Regulatory History of the Statute of Limitations*

The FCC promulgated the statute of limitations for Section 616 complaints in 1993, pursuant to notice-and-comment rulemaking, as part of its original implementation of Section 616. *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and

Order, 9 FCC Rcd. 2642, 2652-53 ¶ 25, 1993 WL 433631 (Oct. 22, 1993). Subsection (f)(3), as originally promulgated, read as follows:

> Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs . . . (3) the complainant has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on a request for carriage or to negotiate for carriage of its programming on defendant's distribution system that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this subpart.

Id. at 2676. Thus, as promulgated, subsection (f)(3) plainly applied only when an MVPD denied or refused to acknowledge a request to negotiate for carriage. The FCC does not dispute that the complaint in this case is untimely under the regulation as written in 1993. Br. for Resp'ts at 64. Therefore, if the Commission has never acted to modify the substance of the regulation since its promulgation in 1993 it follows *a fortiori* that Tennis Channel's complaint is untimely. A review of this regulation's history shows that the substance of subsection (f)(3) never has been amended by the Commission to give it the meaning that the agency now seeks to ascribe to it.

***1994 Amendment*:** In 1994, the FCC issued an order in response to an industry group petition for partial reconsideration of the Section 616 regulations. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage* ("*1994 Amendment*"), Memorandum Opinion and Order, 9 FCC Rcd. 4415, 1994 WL 414309 (Aug. 5, 1994). The petitioners in that action "contend[ed] that Section

76.1302 . . . [was] too narrowly drafted because it [did] not specifically afford standing to file a complaint to any MVPD aggrieved by a violation of Section 616. Petitioners urge[d] the Commission to amend the scope of Section 76.1302 to affirmatively afford standing to file a complaint to any third party MVPD aggrieved by carriage agreements between other MVPDs and programming vendors that violate Section 616." *Id.* at 4416 ¶ 8. The FCC accepted the suggestion and amended several regulatory provisions to achieve the end sought. Subsection (f)(3) was edited in the following ways:

> Any complaint filed pursuant to this ~~subsection~~ **paragraph** must be filed within one year of the date on which one of the following events occurs . . . (3) ~~the complainant~~ **A party** has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on ~~a request for carriage or to negotiate for carriage of its programming on defendant'sdistribution system that has been denied or unacknowledged, allegedly in~~ violation**s** of one or more of the rules contained in this ~~subpart~~ **section.**

Cable TV Act of 1992 – Development of Competition and Diversity in Video Programming; Distribution and Carriage, 59 Fed. Reg. 43,776-01, 43,777-78 (Aug. 25, 1994) (strikethrough and emphasis added).

The language deleted from subsection (f)(3) was excised solely to avoid any suggestion that (f)(3) was meant to reference only complaints by video programmers. There is nothing in the Commission's 1994 action to suggest that the agency meant to make any substantive change to subsection (f)(3) beyond allowing for broader standing for MVPDs. Quite the contrary. The Memorandum Opinion and Order expressly states that the sole purpose of the regulatory edits was to afford standing to file a Section 616 complaint to any

third party MVPD aggrieved by carriage agreements between other MVPDs and programming vendors:

> The Commission has determined that it is in the public interest to grant [the] petition and to amend our implementing rules to specifically afford standing to MVPDs to file complaints under Section 616 of the 1992 Cable Act.

1994 Amendment, 9 FCC Rcd. 4418-19 ¶ 24. The FCC also stated that the same procedural rules would apply to complaints filed by MVPDs. *Id.* at 4419 ¶ 24 n.47 ("As noted in the [original implementation], a one-year statute of limitations will be applied to program carriage complaints.").

***1999 Order on Reconsideration*:** Any questions about the meaning of subsection (f)(3) following the 1994 edits were answered in 1999. As part of its 1998 biennial regulatory review process, the Commission issued a Report and Order after notice and comment to "reorganize and simplify the Commission's Part 76 Cable Television Service pleading and complaint process rules." *1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules*, Report and Order, 14 FCC Rcd. 418, 418 ¶ 1, 1999 WL 377764 (Jan. 8, 1999). The Commission subsequently issued an order denying a petition for reconsideration of these changes filed by EchoStar Communications Corporation. *1999 Order on Reconsideration*, 14 FCC Rcd. 16433. The order is relevant here because it carefully explains the statute of limitations for Section 616 complaints.

Tellingly, as can be seen in the block-quoted passage below, the Commission's 1999 Order on Reconsideration is directly contrary to the Commission's interpretation of 47 C.F.R. § 76.1302(f)(3) in this case:

> The dispute resolution processes in Part 76 for program access, program carriage and open video system complaints follow similar procedural rules that were designed to achieve an expedient resolution of complaints. The rules contain three like provisions which set forth a one year limitations period for bringing complaints. The rules list three events that trigger the running of the limitations period: (1) complainant and defendant enter into a contract alleged to violate the rules; (2) unrelated to an existing contract, defendant makes an offer to complainant that allegedly violates the rules; or (3) <u>defendant unreasonably refuses to negotiate with complainant</u>. In the *Part 76 Order*, the Commission clarified the appropriate interaction between the limitations period for alleging an existing contract violates the rules and the limitations period for alleging that an offer to the complainant violates the rules. . . . The rules adopted in the *Part 76 Order* explain that complaints based on allegedly discriminatory contracts must be brought within one year of entering into the contract and that an allegedly discriminatory offer to amend such contract made more than one year after the execution thereof does not reopen such contract to program access liability. For example, in the program access context, this amendment explains that <u>an offer to amend an existing contract that has been in effect for more than one year does not reopen the existing contract to complaints that the provisions thereof are discriminatory</u>.

Id. at 16435-36 ¶ 5 (underlining added).

The 1999 Order on Reconsideration thus confirms that subsection (f)(3) applies only to refusals to negotiate for carriage and that proposals to amend a carriage contract do not reset the statute of limitations. This interpretation is

perfectly consistent with the regulations as promulgated by the Commission in 1993. It confirms that the 1994 edits to the statute of limitations were not intended to alter the substance of the third trigger, only the scope of who could pursue Section 616 complaints. And the parties have not directed us to any further embellishments or clarifications by the Commission of 47 C.F.R. § 76.1302(f). Indeed, before the decision in this case, the Commission seems never to have called into question the regulatory interpretation of subsection (f)(3) offered in 1993, 1994, and 1999.

2008 Media Bureau Decisions: As noted above, the Media Bureau rejected Comcast's statute-of-limitations defense on the pleadings and set the matter for a hearing on the merits before an ALJ. *The Tennis Channel, Inc. v. Comcast Cable Commc'ns LLC*, Hearing Designation Order, 25 FCC Rcd. 14149, 2010 WL 3907080 (Oct. 5, 2010). In so doing, the Media Bureau relied on two of its own decisions from 2008. In these earlier cases, the Media Bureau held that "Bureau precedent establishes that a complainant may have a timely program carriage claim in the middle of a contract term if the basis for the claim is an allegedly discriminatory decision made by the MVPD, such as tier placement, that the contract left to the MVPD's discretion." *Id.* at 14158 ¶ 15 (citing *NFL Enterprises LLC v. Comcast Cable Commc'ns, LLC*, Hearing Designation Order, 23 FCC Rcd. 14,787, 14820 ¶ 70 (Oct. 10, 2008); *MASN v. Comcast Corp.*, Hearing Designation Order, 23 FCC Rcd. 14,787, 14,834-35 ¶ 105 (Oct. 10, 2008)). Both cases settled before they were heard by an ALJ and without any appeal to or decision by the Commission. *See id.* at 14,156 ¶ 13 n.63.

These Media Bureau decisions are not controlling here because their reasoning was never affirmed by the Commission. And, most significantly, the two cited Media Bureau decisions are directly contrary the Commission's

interpretation of subsection (f)(3) that "an offer to amend an existing contract that has been in effect for more than one year does not reopen the existing contract to complaints that the provisions thereof are discriminatory." *1999 Order on Reconsideration*, 14 FCC Rcd. at 16436 ¶ 5.

As we explained in *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008), this court follows the "well-established view that an agency is not bound by the actions of its staff if the agency has not endorsed those actions." It is true that "in the absence of Commission action to the contrary, the Media Bureau decisions have the force of law. 47 U.S.C. § 155(c)(3). But this simply means that those rulings are binding on the parties to the proceeding. . . . [U]nchallenged staff decisions are not Commission precedent . . . ." *Id.* at 770. Therefore, pursuant to the law of the circuit, it is quite clear that the 2008 Media Bureau decisions did not in any way disturb the FCC's settled treatment of 47 C.F.R. § 76.1302(f).

2. *The Commission's Changed Interpretation of 47 C.F.R. § 76.1302(f)*

This regulatory history shows that the FCC had never, until the Order on review, ascribed to the statute of limitations the meaning it now claims. And the Commission concedes that under its longstanding interpretation of 47 C.F.R. § 76.1302(f), which it has repeatedly articulated, Tennis Channel's complaint in this action is untimely.

Thus, there is much force to Comcast's assertion that it had no notice that the Commission would abruptly change its view of subsection (f)(3) in this case. The problem is compounded because the Commission's decision wholly fails to account for the 1999 Order on Reconsideration. The decision gives only a cursory response to Comcast's argument that the (f)(3) trigger concerns only refusals to deal or similar conduct, merely stating that

> we find no support for that view in the text. Comcast relies upon the fact that the rule was originally promulgated with this limitation. However, the Commission removed the limiting language in 1994, and there is no support for reading it back in notwithstanding its willful deletion.

Order, 27 FCC Rcd. at 8521 ¶ 32. This response is rather astonishing in light of the Commission's explanation of the 1994 edits to the regulation and the 1999 Order on Reconsideration. As noted above, the Commission made it clear that the 1994 edits were intended solely to avoid any suggestion that subsection (f)(3) was meant to reference only complaints by video programming vendors. And in 1999, the Commission confirmed that the (f)(3) trigger relates to situations in which a "defendant unreasonably refuses to negotiate with [a] complainant," nothing more. *1999 Order on Reconsideration*, 14 FCC Rcd. at 16435 ¶ 5.

The FCC simply ignores this regulatory history, obviously because it cannot be squared with the Commission's current interpretation of the applicable regulation. A court need not defer to an agency's interpretation of a disputed regulation when an alternative reading is compelled by "indications of the [agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson Univ*, 512 U.S. at 512. This principle controls the disposition of this case, for it is undisputed that the Commission's current interpretation of the regulation flies in the face of the agency's intent at the time of promulgation of 47 C.F.R. § 76.1302(f).

3. *Subsection (f)(1) Prescribes the Applicable Statute of Limitations in This Case*

Under subsection (f)(1), the one-year statute of limitations begins running when an MVPD "enters into a

contract with a video programming distributor that a party alleges to violate [Section 616 and its implementing regulations]." 47 C.F.R. § 76.1302(f)(1). The Commission held that subsection (f)(1) was inapplicable here because "Tennis Channel was not trying to demand a unilateral change in the existing terms of its contract with Comcast; it was asking that the existing contract be performed – that Comcast exercise its contractual discretion – consistent with its obligations under Section 616." *Order*, 27 FCC Rcd. at 8521 ¶ 33. This is a perplexing statement, bordering on oxymoronic.

Under the terms of the carriage contract, Comcast retains the unfettered right to carry Tennis Channel on a distribution tier of Comcast's own choosing. Neither Tennis Channel nor the Commission argues that Tennis Channel retained an affirmative right under the contract to demand that Comcast reconsider its distribution tier. Instead, they argue that Comcast's right to assign Tennis Channel to a tier of its choosing is somehow tantamount to Tennis Channel's right to demand that Comcast revisit its initial exercise of that choice. The FCC's Order elides this distinction, reasoning that because Comcast could have reassigned Tennis Channel it was under an obligation to consider Tennis Channel's proposal. But nothing in the parties' contract supports this view. Therefore, in demanding "that Comcast exercise its contractual discretion" to reassign Tennis Channel to a different tier, Tennis Channel was simply insisting on a material change in the contract's terms. Subsection (f)(1) thus clearly applies, meaning that Tennis Channel's claim became time-barred in 2006.

The FCC argues that if it is required to adhere to its original and longstanding interpretation of 47 C.F.R. § 76.1302(f)(3) "a programming network effectively would be barred from complaining about any carriage-related

discrimination occurring more than one year after the execution of its contract." Br. for Resp'ts at 67. One need only consider the record in this case to see that this is a shallow argument. Tennis Channel was in the same position relative to the affiliated Golf Channel and Versus networks in 2010 as it was in 2005. That is, Tennis Channel was on a lower tier than the other two networks in 2005 when it negotiated the contract affording Comcast unfettered authority as to its placement and remained so in 2010. Tennis Channel argues that circumstances had changed by 2010 because its "quality and performance" had improved since entering into the contract. Compl. at i. This argument is a classic *non sequitur*, however, because the parties' contract does not require Comcast to take into account "quality and performance" in deciding whether to distribute Tennis Channel more broadly.

Most importantly, the parties' agreement does not in any way suggest, as the Commission held, that Comcast is obliged to "exercise its contractual discretion" in considering whether to reassign Tennis Channel to a different tier. Indeed, the word "discretion" does not even appear in the contract provision that Tennis Channel and the FCC cite. Tennis Channel introduced this term in its briefing and the Commission attempts to read it into the carriage agreement to abrogate Comcast's lawful contract rights. The truth is that the parties' contract simply confirms that Comcast has the sole and unfettered authority to determine the tier placement of Tennis Channel. By demanding that Comcast revisit its concededly lawful initial decision and consider placing it on the same tier as Golf Channel and Versus, Tennis Channel sought to reopen the contract. And, because this demand was nothing more than "an offer to amend an existing contract that has been in effect for more than one year," *1999 Order on Reconsideration*, 14 FCC Rcd. at 16436 ¶ 5, it "does not

reopen the existing contract to complaints that the provisions thereof are discriminatory," *id.*

Furthermore, Tennis Channel's rights would not be so harmed by this outcome as the FCC suggests. Because most businesses hope to become more successful over time, Tennis Channel could have anticipated in 2005 that, at some point in the future, it might prefer placement on a more widely distributed tier. Therefore, when the carriage contract was formed, Tennis Channel could have bargained for a provision to increase its distribution contingent upon improvements to its "quality and performance." If Comcast had declined such terms on the basis of its nonaffiliation with Tennis Channel, that might have given rise to a Section 616 complaint under the existing regulations.

Instead, it is Comcast's contract rights that were completely disregarded by the Commission's actions in this case. Section 616 simply does not sanction what the Commission proposes to do here. The Commission may now be of the view that the controlling construction of subsection (f)(3) that it embraced in 1993, 1994, and 1999 is unsatisfactory because it may not account for some situations in which a party commits a violation of Section 616 that is unrelated to its lawful contractual commitments. But if that is so, then the FCC may amend subsection (f)(3) pursuant to notice-and-comment rulemaking, not by fiat in an adjudicatory action in which a party had no prior notice of the rule that the Commission seeks to enforce.

It is unnecessary to consider this possibility, however, because it is not properly before us. The bottom line here is that, under the Commission's established construction of 47 C.F.R. § 76.1302(f), the statute of limitations began to run under subsection (f)(1) in 2005, not under subsection (f)(3) in 2009. As a result, Tennis Channel's complaint was out of time and should have been dismissed.

4. *The Commission's Laches Argument*

The Commission seemingly understood that its position made little sense, especially in light of the precedent established by its 1993, 1994, and 1999 orders. To compensate for the obvious weaknesses in its decision, the Commission layered a *new* rule of "laches" onto the requirements of subsection (f)(3). Pursuant to this further amendment of the statute of limitations, the Commission stated:

> [W]e read subsection 76.1302(f)(3) consistent with the doctrine of laches to impliedly require notification of an intent to file a complaint within a reasonable time period of discovery of the allegedly unlawful conduct. Because the allegedly unlawful conduct at issue here occurred within one year of the filing of the complaint, we need not determine precisely what period of time would be "reasonable" here.

Order, 27 FCC Rcd. at 8520 ¶ 30 n.105. Comcast justly objects to this unexpected and largely incomprehensible new rule of laches:

> [T]his *further* rewriting of the limitations regulation, to add a malleable [laches] exception whose scope is known only to the FCC, only compounds the uncertainty that its interpretation produces.
>
> The Order also does not attempt to explain how Tennis Channel satisfied its new laches requirement here. Nor could it, given that Tennis Channel has known since 2005 that Comcast carried Golf Channel and Versus broadly, but did not file its complaint until 2010. . . .
>
> Under any reasonable application of laches, this deliberate, unexcused delay should have resulted in the dismissal of the complaint. The Order avoids that result

> only by characterizing the evidence of Tennis Channel's strategic conduct as irrelevant to the timeliness of its complaint. But it is arbitrary for the Order both to assert that its interpretation of the statute of limitations is backstopped by a "reasonable time" requirement, and to ignore the evidence that Tennis Channel, without basis, sat on its claim for years before bringing suit.

Br. for Pet'r at 60-61.

The Commission's invocation of "laches" is also patently at odds with its claim that the terms of subsection (f)(3) plainly require the result reached in this case. The Commission suggests that the (f)(3) trigger applies straightforwardly within one year after a complaining party gives notice that it intends to file a complaint. But if this were so clear, there would be no need for a rule of laches. The Commission instead acknowledges that subsection (f)(3) is confusing under its present view of the regulation because "[t]he third trigger does not specify precisely what impermissible conduct starts the clock." *Order*, 27 FCC Rcd. at 8520 ¶ 30. The Commission's Order relies in part on a 2011 Notice of Proposed Rulemaking, in which the agency acknowledged that the terms of subsection 76.1302(f) are ambiguous and announced its intention to amend it for clarity. *Id.* at 8520 ¶ 30 n.105 (citing *In re Revision of the Commission's Program Carriage Rules*, Notice of Proposed Rulemaking, 26 FCC Rcd. 11494, 11522-23, ¶¶ 38-39, 2011 WL 3279328 (Aug. 1, 2011)). The Commission's position here is thus amusing, to say the least: in the Order under review, the Commission suggests that (f)(3) is clear if overlaid with a *new* rule of laches; and yet, in the very same footnote, the Commission cites to a Rulemaking initiated for the purpose of resolving that subsection's ambiguity. *Id.* The truth of the matter is that the Commission's current position on the meaning of subsection (f)(3) is hopelessly confused

and far removed from the regulatory interpretations that it espoused in 1993, 1994, and 1999.

C. The Commission's Action in This Case Defies the APA and Requirements of Fair Notice

What is obvious here is that the FCC is essentially trying to rewrite its regulations without following the applicable notice-and-comment procedures required by the APA. The Commission may now be of the view that the controlling construction of subsection (f)(3) that it embraced in 1993, 1994, and 1999 is unsatisfactory because it may not account for some situations in which a party commits a violation of Section 616 that is unrelated to its lawful contractual commitments. But if that is so, then the FCC must amend subsection (f)(3) pursuant to notice-and-comment rulemaking, not by fiat in an adjudicatory action in which a party had no prior notice of the rule that the Commission seeks to enforce. *See generally* HARRY T. EDWARDS, LINDA A. ELLIOTT & MARIN K. LEVY, FEDERAL STANDARDS OF REVIEW § XIII.E (2d ed. 2013) (discussing the requirements of "fair notice").

The court carefully explained this principle in *Alaska Professional Hunters Association*:

> Our analysis . . . draws on *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997), in which we said: "Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." We there explained why an agency has less leeway in its choice of the method of changing its interpretation of its regulations than in altering its construction of a statute. "Rule making," as defined in the APA, includes not only the agency's process of formulating a rule, but also the agency's process of

> modifying a rule. 5 U.S.C. § 551(5). *See Paralyzed Veterans*, 117 F.3d at 586. When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment. *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997), is to the same effect: a modification of an interpretive rule construing an agency's substantive regulation will, we said, "likely require a notice and comment procedure."

177 F.3d at 1033-34; *see also SBC Inc. v. FCC*, 414 F.3d 486, 498 (3d Cir. 2005) ("[I]f an agency's present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment requirements of the APA."); *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001) ("[T]he APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation.").

The Supreme Court recently reinforced this point in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012), there holding that an agency is obliged to "provide regulated parties fair warning of the conduct [a regulation] prohibits or requires." It follows, therefore, that an agency cannot change its interpretation of a regulation so as to cause "unfair surprise" to regulated parties. *Id.*; *see also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."). Yet, in failing to provide any notice to MVPDs about how and when they may be subject to Section 616 claims, the FCC's actions

against Comcast in this case constitute exactly that kind of "unfair surprise."

In sum, the limitations period under 47 C.F.R. § 76.1302(f)(3) does not apply here because the Commission has consistently held that the (f)(3) trigger is applicable only in situations when an MVPD denies or refuses to acknowledge a request to negotiate for carriage. Tennis Channel's complaint does not include any such claim. Indeed, Tennis Channel, not Comcast, terminated discussions between the parties in 2009. Neither Comcast's refusal to reassign Tennis Channel to a more broadly distributed tier nor Tennis Channel's notice of its intention to file a Section 616 complaint triggered a new statute of limitations period under 47 C.F.R. § 76.1302(f)(3). Under the FCC's governing regulations, "an offer to amend an existing contract that has been in effect for more than one year does not reopen the existing contract to complaints that the provisions thereof are discriminatory." *1999 Order on Reconsideration*, 14 FCC Rcd. at 16436 ¶ 5. The reason for the FCC's rule is clear: to allow a video programming vendor to restart an expired limitations period simply by asking to negotiate a better deal under an existing agreement would render meaningless the limitations period in subsection (f)(1).

It is undisputed that the complaint was filed more than one year after Comcast and Tennis Channel entered into their carriage contract. The contract was executed in 2005 and the limitations period under 47 C.F.R. § 76.1302(f)(1) expired one year later. Tennis Channel's complaint simply alleges that Comcast's continued carriage pursuant to the terms of the 2005 agreement is discriminatory. Therefore, the complaint is almost four years late and should be dismissed as time-barred.